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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 104

MORRIS A. KENT, JR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONER

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(By appointment of the U. S. Court of Appeals)

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BRIEF FOR THE PETITIONER

Opinion Below

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 343 F. 2d 247 (1965).

Jurisdiction

The judgment of the U. S. Court of Appeals affirming the judgment of the District Court was entered on October 26, 1964. This Court granted certiorari on May 3, 1965. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

Constitutional and Statutory Provisions Involved

The Fifth Amendment provides in part:

"No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . "

The Sixth Amendment provides in part:

"In all criminal prosecutions the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

D.C. Code § 11-902 provides:

"Purpose and basic aims.

The purpose of this subchapter is to secure, for each child under its jurisdiction such care and guidance, preferably in his own home, as will serve the child's welfare and the best interests of the state; to conserve and strengthen the child's family ties whenever possible, removing him from the custody of his parents only when his welfare or the safety and protection of the public cannot be adequately safeguarded without such removal; and, when such child is removed from his own family, to secure for him custody, care, and discipline as nearly as possible equivalent to that which should have been given by his parents."

D.C. Code § 11-907 provides:

"1. Children.—Except as herein otherwise provided, the court shall have original and exclusive jurisdiction of all cases and in proceedings:

(a) Concerning any child coming within the terms and provisions of this subchapter.

(b) Concerning any person under 21 years of age charged with having violated any law, or violated any ordinance or regulation of the District of Columbia, prior to having become 18 years of age, subject to appropriate statutes of limitation."

A revised section—D.C. Code § 11-1551 (1963) has produced no substantive change.

D.C. Code § 11-912 provides:

"Whenever any officer takes a child into custody, he shall, unless it is impracticable or has been otherwise ordered by the court, accept the written promise of the parent, guardian, or custodian to bring the child to court at the time fixed. Thereupon such child may be released in the custody of a parent, guardian, or custodian. If not so released, such child shall be placed in the custody of a probation officer or other person designated by the court, or taken immediately to the court or to a place of detention provided by the Board of Public Welfare, and the officer taking him shall immediately notify the court and shall file a petition when directed to do so by the court."

A revised section—D.C. Code § 16-2306 (1963) is identical except for mention of the Board of Commissioners instead of Public Welfare.

D.C. Code § 11-914, provides:

"If a child sixteen years of age or older is charged with an offense which would amount to a felony in the case

of an adult, or any child charged with an offense which if committed by an adult is punishable by death or life imprisonment, the judge may, *after full investigation,* waive jurisdiction and order such child held for trial under the regular procedure of the court which would have jurisdiction of such offense if committed by an adult; *or such other court may exercise the powers conferred upon the juvenile court in this Act in conducting and disposing of such case.*" (Emphasis supplied.)

A revised section—D.C. Code § 11-1553 (1963) is substantially identical.

D.C. Code § 11-929(b), provides:

"The records made by officers of the court pursuant to sections 11-908 and 11-924, referred to in this section as social records, shall be withheld from indiscriminate public inspection, except that such records or parts thereof shall be made available by rule of court or special order of court to such persons, governmental and private agencies, and institutions as have a legitimate interest in the protection, welfare, treatment, and rehabilitation of the child, and to any court before which any such child may appear. The judge may also provide by rule or special order that any such person or agency may make or receive copies of such records or parts thereof. No person, agency, or institution which has received records or information under this section may publish or use them for any purpose other than that for which they were received."

A revised section—D.C. Code § 11-1586(b) (1963) is substantially identical.

D.C. Code § 11-929(c), provides:

> "It shall be unlawful for any person or persons to disclose, receive, or make use of, or authorize, knowingly permit, participate in, or acquiesce in the use of any information concerning any juvenile before the court, directly or indirectly derived from the records, papers, files, or communications of the court, or acquired in the course of the performance of official duties."

A revised section—D.C. Code § 11-1586(c) (1963) is substantially identical.[1]

Questions Presented

I. Is Juvenile Court action in contemplation of transfer of a child to adult court for trial for capital crimes subject to due process and, if so, is such child in such Juvenile Court proceedings entitled to:

a. Immunity from protracted incommunicado interrogation and fingerprinting by the police with or without the permission of Juvenile Court authorities;

b. The right through counsel to familiarize himself with social records which are considered by the Juvenile Court as the basis of transfer or "waiver of jurisdiction";

c. A hearing at which such child—if it so requests through counsel—is entitled to present its case against

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[1] We invite the attention of the Court to the fact that a revision of the Juvenile Court Act, not in effect at the time of the petitioner's proceedings in Juvenile Court, was enacted by Congress and became law December 23, 1963, Pub. L. 88-241. This revision has not made any substantial changes affecting the rights of juveniles. See *Appendix B.*

waiver and familiarize itself with the facts which lead the Juvenile Court to consider waiver;

d. Effective assistance of counsel in the Juvenile Court preliminary to waiver?

II. Does a United States District Court have jurisdiction to try a minor on capital charges where the following circumstances appear:

a. Jurisdiction is waived by a Juvenile Court after denial to a minor of the rights hypothesized under I(a), (b), (c) and (d);

b. The District Court declines to conduct any manner of hearing on a motion to dismiss the indictment on that score;

c. The District Court summarily denies the minor an opportunity to be heard on his request that it constitute itself a juvenile court?

III. Does a United States District Court commit plain error affecting the substantial rights of a child, where jurisdiction has been waived by a Juvenile Court, by admitting into evidence and permitting reference to, and comparisons of, fingerprints taken from the child by the police while he was under the exclusive jurisdiction of the Juvenile Court?

IV. Does a United States District Court err when it refuses to grant judgment of acquittal on all counts of the indictment, on the ground of insanity, where there is not sufficient competent evidence to prove beyond a reasonable doubt either (1) that the accused has no mental disease or defect or (2) that, although the accused is defective

or diseased, the said acts were not the product of such mental disease?

V. Does a United States District Court commit plain error affecting the substantial rights of a defendant on trial for his life when it gives the jury the so-called "Allen" or "dynamite" charge before the jury retires to consider its verdict?

Introduction

In the District of Columbia, as in substantial numbers of other American jurisdictions, "exclusive jurisdiction" over children charged with offenses is vested by the legislature in a Juvenile Court. D.C. Code § 11-907 (1951).

The right to "waive jurisdiction" over such minors in restricted cases is vouchsafed to the Juvenile Court here as elsewhere upon the satisfaction of a statutory requirement of "full investigation." D.C. Code § 11-914 (1951).

This case raises the question—it is believed for the first time in this Court—as to whether such waiver proceedings are in fact subject to the constitutional safeguards exemplified by "administrative," "civil," or "criminal" due process of law.

It raises further serious and disturbing questions as to the quality of justice, facing a 16 year old boy, "waived" by a Juvenile Court in a District Court of the United States.

Statement of the Case

Petitioner was indicted and tried on eight counts in a single indictment. The first three counts alleged that on or about June 5, 1961 he committed housebreaking, robbery and rape of one Echols in her home; the 4th and 5th counts alleged that on or about June 12, 1961 he committed housebreaking and robbery of one Palmer in her home; the 6th, 7th and 8th counts alleged that on or about September 2, 1961 he committed housebreaking, robbery, and rape of one Murphy in her home. He was convicted on the three housebreaking and the three robbery counts, and was thereafter sentenced to serve 5 to 15 years on each such count to run consecutively, a total of 30 to 90 years. He was found not guilty by reason of insanity on counts 3 and 8, charging him with rape.

Petitioner was a child aged sixteen at the time of his arrest in the instant case, and had theretofore been a probationer of the Juvenile Court and subject to its care for two years. Although a "marked deterioration of [petitioner's] personality structure . . . and the possibility of petitioner being the victim of mental illness" had been conceded by the Juvenile Court authorities some time after his arrest in instant case, petitioner had never been subjected to mental examination nor afforded psychiatric treatment under the auspices of the Juvenile Court.[1a]

[1a] The quotation is based on part of the Juvenile Court record read into evidence near the conclusion of defendant's case in the trial transcript in District Court T. 628. The reference to the neglect of the petitioner's mental health in Juvenile Court is based on uncontroverted affidavits filed in support of the motion to dismiss indictment in District Court.

Petitioner was arrested about 3:00 P.M. on September 5, 1961. Under District of Columbia law the Juvenile Court had "exclusive jurisdiction" over him.[2] The basis for his arrest was the use of fingerprints taken by the police when he was 14 years old and a ward of Juvenile Court. Instead of being taken to the Juvenile Court or to the Receiving Home for Children or before a probation officer as required by law,[3] he was taken to police headquarters where he was kept until 10:00 P.M. He was interrogated throughout this period by police officers acting in relays.[4] In the light of the trial transcript, it is clear that this period was also utilized to secure additional fingerprints Trial Transcript 198.

Some time after 10:00 P.M. petitioner was brought to the Receiving Home for Children and there placed in solitary confinement. He passed a sleepless night. Early the next morning the Receiving Home released him for further police interrogation at police headquarters. He was again unremittingly interrogated by police officers acting in relays.

Shortly after 2:00 P.M. on September 6, 1961, during this period of police interrogation, counsel was retained by petitioner's mother. Counsel promptly conferred with

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[2] D.C. Code § 11-907 (1951). Revised section D.C. Code § 11-1551 (1963) has produced no substantive change.

[3] D.C. Code § 11-912 (Supp. VIII, 1960). The revised section, not in effect at time of petitioner's case is identical on this point. D.C. Code § 16-2306 (1963).

[4] See uncontroverted affidavit by defense counsel in support of motion to dismiss indictment filed in District Court.

The balance of the statement of the case is founded on the uncontroverted assertions of the motion to dismiss indictment and *all* of the uncontroverted affidavits, filed in support thereof, in District Court, which are part of the unprinted record in this case.

the Social Service Director of the Juvenile Court. Although petitioner was at the time of the conference in the custody of the police undergoing interrogation, his counsel was not informed that petitioner could be found in any place other than the Receiving Home for Children. In point of fact, during that conference, counsel was handed a brochure providing directions as to how to reach the Receiving Home.

Only during what appeared to be an intermission in police interrogation, was petitioner seen and briefly talked with by an official of the Juvenile Court.

The Juvenile Court subsequently declined to grant a motion made by petitioner's counsel to direct the authorities of the Receiving Home for Children to refuse to turn defendant over to the police for further interrogation. A formal objection to the treatment of the defendant was left unanswered. *See motion to dismiss and defense counsel's uncontroverted affidavit in support thereof in District Court.*

Preliminary to waiver, officials of the Juvenile Court did not confer with petitioner's mother for more than five minutes. Petitioner's father was not contacted by the Juvenile Court at any time. The Rev. Martin Davis, the Principal of Mackin High School, the school attended by petitioner, also was not contacted by the authorities of the Juvenile Court either before or after petitioner's arrest. Nor was any member of his staff which included a psychiatric social worker.[5]

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[5] The affidavits annexed to the motion to dismiss the indictment, show that minimal contact had been maintained by Juvenile Court officials with petitioner's mother prior to petitioner's arrest in the instant case and that the mother had never had an opportunity to communicate what she knew about petitioner's bizarre behavior and incontinence.

Petitioner's detention at the Receiving Home extended for almost a full week. At no time during this period was petitioner afforded any arraignment or formal notice as to the cause of his loss of liberty at the hands of the Juvenile Court. He was, however, examined by two psychiatrists and a psychologist at the instance of his counsel. Unlike the police who encountered no bar in securing access to petitioner, one of the psychiatrists was on one occasion refused admission to the Receiving Home; access was later granted to him but too late for him to see petitioner that day.

Before the Juvenile Court, petitioner offered to prove, through appropriate expert testimony, that he was and had been mentally ill for a considerable period of time; that his mental illness had been neglected by the authorities of the Juvenile Court; and that, given adequate treatment in a hospital setting, *he was a fit subject for rehabilitation under the aegis of the Juvenile Court. Ibid.*

An uncontroverted affidavit of one of the psychiatrists submitted to the Juvenile Court in support of the motion, informed the Court:

> "It is my professional opinion that the respondent [petitioner] is a victim of severe psychopathology and that a complete investigation of the psychological and social factors of his case is impossible without placing him in a hospital situation for psychiatric observation." *Ibid.*

That psychiatrist further offered to recommend a treatment situation to the Juvenile Court which would permit the continued handling of petitioner by the Juvenile Court without endangering the public. The Juvenile Court, how-

ever, sought no information from that psychiatrist. *Ibid.*; see also affidavit of Dr. Leon Salzman filed in support of the motion to dismiss.

Petitioner's counsel at that time moved the Juvenile Court (1) to "transfer . . . [petitioner] immediately to the District of Columbia General Hospital Psychiatric Division for appropriate psychiatric observation," (2) to "disclose its Social Service File to . . . [petitioner's] counsel," and (3) to hold "a hearing . . . immediately after the termination of the period of hospitalization, if waiver of jurisdiction of this case [was] . . . contemplated, as a condition precedent to any valid waiver." Petitioner's counsel further and formally informed the Juvenile Court that "adequate psychiatric facilities in the handling of . . . [petitioner were] available to the Juvenile Court in the District of Columbia General Hospital, which [had] an in-patient department specializing in the care of children and of adolescents." Petitioner's counsel further requested that "the Social Service file should be made available" to him; *that without it he was unable "to study the data upon which a judicial decision as to waiver* [would] be based"; and that if he was "denied access to the Social Service file and, particularly, to the psychological test results, which, if disclosed, he . . . [intended] to submit to the scrutiny of appropriate experts available to him, . . . [petitioner would] be denied effective assistance of counsel." See *motion to dismiss indictment and defense counsel's uncontroverted affidavit in support thereof filed in the District Court.* The files in the Juvenile Court are of course subject to independent judicial notice by this Court.[6] (Emphasis supplied.)

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[6] The facts as thus stated—subject to ready verification by this Court—appear in patent conflict with the view expressed by

The Juvenile Court never passed upon the motion. Petitioner's counsel was never heard upon the motion. Indeed, petitioner's counsel was never afforded, during any part of the proceedings, any audience by the judge of the Juvenile Court, either formal or informal, in chambers or in court. Nor did the Juvenile Court request any additional information of the two psychiatrists and the psychologist who had examined petitioner, or of petitioner's counsel. While the record of this case shows that upon last minute evaluation before waiver, the Juvenile Court noted its awareness of the fact that petitioner was a probable victim of mental illness, it also shows that the Juvenile Court had no knowledge of what mental illness it was that petitioner was probably suffering from and that it had at no time investigated the question as to whether the petitioner's mental illness was amenable to treatment and control under the aegis of a Juvenile Court disposition or whether in fact petitioner was mentally competent to assist counsel in his opposition to waiver. Certainly petitioner's expert witnesses had no clear opinions as to the latter issue.

Without any opinion or other statement of reasons, the Juvenile Court, on September 12, 1961, entered an order stating that, "after full investigation, I do hereby waive jurisdiction over the following offenses, which would amount to felonies if committed by an adult, charged against MORRIS ALLEN KENT, JR., born October 20, 1944, of

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Bazelon, C. J. in *Watkins* v. *United States*, 343 F. 2d 278, 282 n. 9 (D.C. Cir. 1964), to the effect that counsel's *central* purpose in Juvenile Court was to secure the social records for independent medical assessment. Affirmance of petitioner's case by the Court of Appeals in *Kent* v. *United States*, 343 F. 2d 247 (D. C. Cir. 1964) is thus squarely in conflict with *Watkins* v. *United States*, 343 F. 2d 278 (D.C. Cir. 1964) decided by a different panel of the same Court of Appeals within weeks of the *Kent* decision.

1823 S Street, N. W., in the District of Columbia . . . [enumerating the charges], and I do hereby order said child held for trial for such offenses under the regular procedure of the U. S. District Court for the District of Columbia." *Ibid.*

The waiver of petitioner, a 16-year-old child suffering from lapses of bowel control according to all of the experts who were ever to examine him, was entered pursuant to *Policy Memorandum* No. 7 of the Juvenile Court issued on November 30, 1959 and including among its criteria of waiver such considerations as:

"1—The seriousness of the alleged offense to the community and whether the protection of the community requires waiver.

. . . .

"4—The prosecutive merit of the complaint, i.e., whether there is evidence upon which a Grand Jury may be expected to return an indictment (to be determined by consultation with the United States Attorney).

. . . .

"6—The sophistication and maturity of the juvenile as determined by consideration of his home environmental situation, emotional attitude and pattern of living.

. . . .

"8—The prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile (if he is found to have committed the alleged offense) by the use of procedures, services and facilities currently available to the Juvenile Court."[7]

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[7] The policy memorandum was the subject of judicial notice and consideration by the Court of Appeals below. See *Kent* v. *United States, supra.*

Thereafter, petitioner filed a habeas corpus petition in the District Court, asserting that, since the Juvenile Court had never properly divested itself of jurisdiction of his case, the District Court had not acquired jurisdiction thereover. More specifically, the petitioner asserted in his habeas corpus petition that the Juvenile Court had deprived him of due process of law and had not accorded him the "full investigation" which was the prerequisite to waiver under D.C. statute.

Simultaneously petitioner, proceeding on the self-same ground also noted a direct appeal from the Juvenile Court order of waiver to the then Municipal Court of Appeals.

Both the dismissal of the habeas corpus petition and the affirmance of the Juvenile Court order of waiver were appealed, the former several days before the return against petitioner of an indictment charging him with the 8 counts of rape, robbery and housebreaking, previously set forth.

On January 22, 1960, the Court of Appeals held in the companion cases of *Kent* v. *Reid* and *Kent* v. *District of Columbia*, 316 F. 2d 331 (D.C. Cir. 1963) that *habeas corpus* did not lie and was "unnecessary to preserve [petitioner's] . . . rights [and] would interfere with and unnecessarily delay the orderly processes of the District Court" and that, moreover, the Juvenile Court order of waiver was not appealable. *Ibid.*

Significantly the Court went on to declare that proceedings to determine whether "full investigation" was made by the Juvenile Court were available upon a motion to dismiss the indictment in the District Court "if sufficient allegations . . . [were] made." *Ibid.*

It went on to declare that petitioner was also free to request the District Court to constitute itself a Juvenile

Court for his case. [*Ibid.*] The Court of Appeals thereafter declared that in the event that petitioner's motions should be denied by the District Court, the District Court order denying said motions "would be reviewable by this Court [i.e., the Court of Appeals] in the event [petitioner] is ultimately convicted." *Ibid.*

Prior to the Court of Appeals decision on *Kent* v. *Reid, supra,* and *Kent* v. *District of Columbia, supra,* petitioner had in fact filed a motion to dismiss the indictment in the District Court. The motion asserted that the order of the Juvenile Court, waiving jurisdiction, was invalid and hence incapable of conferring jurisdiction on the District Court under the regular procedure governing the trial of adults. The invalidity of the Juvenile Court order, the motion went on to assert, inhered in denying the petitioner fundamental fairness as secured by the due process clause of the Fifth Amendment, the right of effective assistance of counsel as secured by the Sixth, and in further denying petitioner the right as secured by D.C. Code § 11-914 (1951) of "full investigation." [7a]

The grounds set forth for the invalidity of the order in the motion to dismiss were, in sum, the same as those contained in the habeas corpus petition and the direct appeal from the Juvenile Court order.

The motion prayed that the "indictment be dismissed and the case remanded to the Juvenile Court *unless* [the District] . . . *Court wishes to assume jurisdiction as a Juvenile Court in this case.*" (Emphasis supplied.)

It was supported by the uncontroverted affidavits by petitioner's parents, setting forth data, exemplifying petition-

[7a] Revised D.C. Code § 11-1553 (1963) has produced no substantive change.

er's disturbed behavior, beginning early in childhood and continuing to the present, including disorientation, auditory hallucinations and lack of bowel control and asserting that such data were never communicated to the Juvenile Court authorities. It was further supported by the uncontroverted affidavits of petitioner's school principal and guidance counselor, setting forth further data in exemplification of petitioner's disturbed behavior in the school setting and asserting alike that such data were never communicated to the Juvenile Court because that Court had not made contact with the school authorities. It was further supported by the uncontroverted affidavit of Dr. Leon Salzman, a psychiatrist, who had examined petitioner at the behest of petitioner's counsel while petitioner was detained in the Juvenile Receiving Home. Dr. Salzman asserted that petitioner was a victim of grave psychopathology the exact nature of which should be studied in a hospital setting, that petitioner might be amenable to treatment and restoration to society within the framework of the Juvenile Court and that he, Dr. Salzman, had offered to recommend a treatment situation to the Juvenile Court but that his offer had been spurned. It was further supported by the uncontroverted affidavit of petitioner's counsel as to petitioner's arrest, interrogation and detention, as previously set forth, under Juvenile Court auspices, as to his failure to be heard by the Juvenile Court—either formally or informally—as to petitioner's illness, the neglect of that illness by Juvenile Court, and the prospects of petitioner's rehabilitation under Juvenile Court auspices, as to his failure to secure the social service records in Juvenile Court in an attempt at demonstrating the impropriety of waiver, and as to his failure to secure petitioner's hospitalization prior to waiver by the Juvenile Court. See *counsel's uncontroverted affidavit. Supra.*

While in District Court petitioner filed a further motion for hospitalization. See *unprinted record of the case.*

The motion to dismiss the indictment for failure to accord petitioner due process and a full investigation in Juvenile Court was summarily denied by the District Court and a proffer of testimony of former counsel, relatives and school authorities based upon the affidavits filed in support of that motion spurned likewise. In sum, the District Court did not even pause to conduct a hearing, however short, as to the allegations of denials of constitutional and statutory rights made in this case. *Transcript of Proceedings Before Chief Judge McGuire,* Feb. 8, 1963, pp. 16-21.

An oral motion founded upon the motion to dismiss, requesting the District Court "to constitute itself a Juvenile Court" was further summarily denied by the Chief Judge of the District Court "with emphasis". *Transcript of Proceedings Before Chief Judge McGuire,* Feb. 5, 1963, p. 16 and Feb. 8, 1963, p. 21.

While refusing to accord petitioner any opportunity to be heard on the denial of his rights in Juvenile Court and refusing to permit the payment of petitioner's expert witnesses anything beyond the nominal witness fee, the District Court Judge, passing on the motions declared that it "had a suspicion . . . that this [presumably the entry into the case of psychiatric experts outside the ranks of the D.C. General and St. Elizabeth's hospitals was] . . . a stimulated activity, and [he, i.e., the judge was] concerned about the activities of the National Institute of Health and the Washington School of Psychiatry . . . [and] if that . . . [was] so, somebody . . . [was] going to get in serious trouble." *Proceedings Before Chief Judge McGuire,* Feb. 18, 1963, p. 26. The judge thereupon directed petitioner's counsel

to "advise" the District Court "by the end of the week" about the activities of the suspect Washington School of Psychiatry (*Id.*, pp. 28-29) which had furnished petitioner with some of his prospective expert witnesses.

One such expert was referred to at that time by the prosecuting counsel, without any manner of reproof by the District Court, as "*that* Goshen from West Virginia, *that* Dr. Goshen, I mean . . . , hooked up with *that* Washington School of Psychiatry . . ." (*Id.*, 27-28). (Emphasis supplied.)

The motion for mental examination at the D.C. General Hospital, however, was granted. Unwilling to accept the evaluation of the D.C. General Hospital staff, the prosecution had insisted upon inclusion within the court order directing such mental examination, the statement that the hospital was to afford prosecution psychiatrists, outside of the hospital staff, access to the petitioner.

When the D.C. General Hospital reported that it found petitioner to be a victim of schizophrenia and his crimes, if any, the probable products of his illness and pronounced petitioner *mentally incompetent* to stand trial, the Government objected to the D.C. General report and the District Court, acting *sua sponte* committed petitioner for further examination at St. Elizabeth's. St. Elizabeth's Hospital in turn certified petitioner as competent to stand trial but expressed the firm opinion that the petitioner was schizophrenic and his crimes, if any, the products of his disease. See unprinted record of District Court orders.

At this stage not one, but two government hospitals had pronounced petitioner schizophrenic and his crimes, if any, a product of his mental disease.

A motion for a judicial determination of petitioner's competency to stand trial resulted in a hearing in District Court. While the prosecution succeeded in securing last-minute psychiatric examination of petitioner in the District Jail by staff members of St. Elizabeth's Hospital, the defense did not succeed in obtaining a court order for a further examination by members of the staff of the D.C. General Hospital. A defense psychiatrist, Dr. Warren C. Johnson, attempted to see petitioner in the District Jail to bring his findings up to date after the petitioner's transfer to the District Jail from St. Elizabeth's Hospital. He was squarely informed by the jail authorities that he would not be admitted to the Jail to examine his patient. *Affidavit of Dr. Warren C. Johnson in District Court.*

At the competency hearing, one St. Elizabeth's psychiatrist testified in conclusory terms that petitioner was competent to stand trial although he admitted that petitioner's recollection of events touching the period of the indictment appeared defective (he suggested but at no time claimed that petitioner might be malingering to some extent); another testified in similarly conclusory terms that petitioner was competent but that he had no problems with his recollection, while petitioner's counsel himself testified that he had never succeeded in maintaining rational communication with his client.[8]

The District Court declared that in its "opinion, the question of competency to stand trial is primarily a medical question." Addressing itself to defense counsel, it then declared as follows:

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[8] The record contains the affidavits of two counsel for the defense in advance of trial in addition to the testimony of the trial counsel for the defense that rational communication with the petitioner was impossible.

"I have before me the testimony of Doctor Owens and Doctor Platkin . . . in whose professional standing, ability and competency I have great faith and great confidence.

"Of course, I have no question but what you tell me is true, but I think that with you this defendant may well be malingering."

It then adjudged the defendant competent to stand trial. *Transcript of Proceedings Before Judge Hart,* March 7, 1963.

The case proceeded to trial by a jury on March 14, 1963. Prior to the opening statement of the prosecutor, the trial Court sustained a motion to suppress the evidence seized from petitioner and from his home. The prosecutor declared that his confession was not to be offered in evidence (T. 16).

The prosecution called 17 witnesses. The two alleged rape victims, Juanita Echols and Mary Murphy both testified that they were awakened in the early hours of the morning, raped and robbed. Only Murphy identified petitioner as the assailant. The prosecutor later volunteered to the Court that Echols had identified another person, not petitioner, from a photograph as the intruder, but could not identify that person when seen in a lineup (T. 213). Witnesses were called whose testimony tended to show that Echols had had intercourse with a male on the date of the alleged assault. Also, witnesses were called who identified fingerprints taken from the dwellings of both alleged victims as being identical to fingerprints taken from petitioner after his arrest (T. 91-92; 206).

Also called as a witness by the prosecution was Gloria Palmer (T. 96) who testified that she was awakened early

in the morning in her apartment, which was shared by her room mate who did not testify, by a hand over her mouth. She testified that when she screamed the alleged intruder went out the door. However, she was not able to identify petitioner as the alleged intruder. She claimed that she subsequently discovered that her wallet containing $47.00 was missing. Another witness for the prosecution testified that he took fingerprints from Palmer's apartment and when compared to petitioner's fingerprints they were similar (T. 11).

When the prosecution rested its case counsel for petitioner moved for judgments of acquittal on all counts in the indictment. This motion was denied (T. 215).

The case for the defense was presented through the testimony of four lay witnesses and twelve expert witnesses. The lay witnesses consisted of petitioner's mother, uncle and two aunts. The expert witnesses consisted of five psychiatrists, four psychologists, and one psychiatric social worker. The testimony of two additional psychiatrists was put in the record by stipulation.

All of the lay witnesses testified that from their observations, petitioner's conduct was highly abnormal, that it was manifested by strange and bizarre acts, and that this seemed to intensify. Petitioner's mother testified that when petitioner was very young he had seen his father attempting to choke her to death and that subsequent to that event petitioner had become nervous, his behavior changed, and "he would be in a trance" (T. 220). Petitioner's mother also testified that petitioner was extremely frightened of his father, and this in turn was corroborated by the other lay witnesses.

Drawn from the two public psychiatric institutions as well as private practice, all psychiatrists and psychologists produced by the defense, asserted that petitioner was the victim of a schizophrenic mental illness and that his crimes, if any, were produced by it. The psychiatric social worker restricted his testimony to the observation that he had seen petitioner in his school environment and that in his view petitioner had needed psychiatric help. See *Appendix A* for more detail.

On rebuttal, prosecuting counsel called a psychiatric expert from a public institution. The latter testified that petitioner was a victim of a schizophrenic mental illness. In his attempts at "rebutting productivity," prosecuting counsel asked the witness a number of hypothetical questions, using assumptions not supported by the record. The witness replied to all of them—to some in terms of suggestions of the improbability that the disease produced the crimes charged in the indictment. See *Appendix A* for more detail.

Another expert witness summoned by the prosecuting counsel was in private practice and testified that in his view petitioner had a "schizoid personality" and that this term did not represent a disease. Asked as to whether petitioner was "normal," he replied: "I hope I haven't given that impression" (T. 704). See *Appendix A* for more detail.

Both sides then rested their case. The defense renewed its motion for judgment of acquittal. The Court denied it (T. 730).

Arguments to the jury included inflammatory castigation of defense psychiatrists by the prosecuting counsel (T. 743-745, 764-766).

On two separate occasions moreover prosecuting counsel argued that the evidence showed that the alleged robberies were committed before the alleged assaults (T. 740-741, 762). This was not based upon the facts disclosed in the record.

The Court thereupon charged the jury (T. 776-820). In that charge, before the jury retired to consider its verdict, the Court gave this version of the Allen or "dynamite charge":

> "You have before you all of the evidence which the Government and the defendant can offer in this case. The verdict which you return to the courtroom should represent your individual opinions. In other words, each of you must arrive at your own verdict; but this does not mean that your views, your opinions may not be changed by conference in the jury room. The object of the jury system is to secure a unanimous verdict by comparison of views and by arguments and by discussion among the jurors themselves. Each of you should listen with deference to the arguments of the other jurors and with a distrust of your own judgment if you find that a large majority of the jurors take a different view of the case than that which you yourself take.
>
> None of you should go into the jury room with a blind determination that the verdict should represent your opinion of the case at the moment you leave the courtroom, or that you should close your ears to the arguments of other jurors who are equally honest and equally intelligent with yourself. Accordingly, although the verdict must be the verdict of each of you individually and not a mere acquiescence in the conclusion of your fellow jurors, the Court instructs you that you

should examine the issues submitted with candor and with a proper regard and deference to the opinions of each other. It is your duty to decide this case if you can conscientiously do so. You should listen to each other's arguments with a disposition to be convinced.

If in any question put to you for a vote by your foreman, any one of you should find that you are a very pronounced minority on any question, you should appraise your situation. You should ask yourself, Why did this evidence make such an impression on me when it didn't make a similar impression on a great number of other jurors who are equally honest and equally intelligent with myself?

I repeat, your verdict must be a unanimous one. It must represent your individual view of the case, but you should not solidify your judgment in the case until you have had an opportunity to listen with an open mind to the discussion of all of the other jurors in the jury room" (T. 815-816).

As previously noted, petitioner was convicted of housebreaking and robbery and accorded an insanity acquittal on the counts of rape. He was sentenced to serve 30 to 90 years in prison, the time to be spent at St. Elizabeth's Hospital on the mandatory commitment after the insanity acquittal, i.e., until such time as he recovered his sanity, to be counted as part of the 30 to 90 years sentence.

The U. S. Court of Appeals for the District of Columbia Circuit affirmed through McGowan, *J.*, *Kent* v. *United States*, 343 F. 2d 247 (D.C. Cir. 1964). A concurring opinion by Washington, *J.*, declared that it was "a fair inference from the record . . . that one of the reasons why

the Juvenile Court waived jurisdiction was because . . . [petitioner] was seriously disturbed and the Juvenile Court lacked facilities to adequately treat him." *Id.*, 262.

Summary of Argument

I

Juvenile Court action directed against a delinquent boy or girl is fraught with significant deprivation—indistinguishable from punishment—particularly in the absence of adequate resources. Fairness requires "that there shall be no greater diminution of the rights of a child, as safeguarded by the Constitution, than should be suffered by an adult charged with an offense equivalent to the alleged act of delinquency of the child." Of all sanctions meted out by the Juvenile Court, the most "critically important . . . for the child" is waiver of Juvenile Court jurisdiction and the transfer of that child to adult court for trial under adult procedure.

Proceedings leading to waiver should therefore be subject to constitutional safeguards of fundamental fairness, commensurate with the gravity of the situation, and include a settled procedure for the apprehension and detention of the child. A hearing satisfying the minimal requirements of fairness of administrative due process in adversary matters and effective assistance of counsel is therefore essential. So is freedom from coercive interrogation.

This had been denied the petitioner.

II

The police practices engaged ostensibly under the aegis of the Juvenile Court in this case and including the protracted incommunicado interrogation of petitioner at police headquarters and the subsequent denial to petitioner by the Juvenile Court of hospitalization for his mental illness and of an opportunity of explaining or refuting secret evidence relied on by that Juvenile Court in its decision to waive jurisdiction violated the D.C. statutory scheme and was thus incapable of conferring jurisdiction on the District Court.

III

The District Court compounded existing prejudice by admitting in evidence products of lawlessness in law enforcement. The District Court further erred in denying a motion for judgment of acquittal by reason of insanity in the light of the evidence in this case.

ARGUMENT

I.

The Juvenile Court Action in General and Proceedings Leading to Waiver of Jurisdiction by the Juvenile Court in Particular Are Subject to Requirements of Due Process.

Taking a child from his home "to a building with white-washed walls, regimented routine and institutional hours,"[9] until he reaches his majority, subjecting him to the restrictions of probationary discipline for a like period, or confining him in an overcrowded "Receiving Home" pending an investigation of evidence pointing to his "involvement" in capital or other serious crime—and then transferring him to adult court to stand trial under adult procedures and thereby exposing him—if convicted—to adult punishment[10] is characteristic action taken in Juvenile Courts throughout the country.

Although technically engaged in adjudication of "status" rather than "crime", Juvenile Courts inflict punishment in all of the examples cited above. Designation of their proceedings as "civil" rather than "criminal"[11] in no way detracts from the consequences of Juvenile Court action in terms of the pain suffered by stigmatization as a juvenile delinquent, by loss of liberty or by exposure to adult punishment. The latter is perhaps the most "awesome decision" confronting the Juvenile Court—"a critically important

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[9] The language is that of dissent but the description one of operative fact. See Musmanno, J., in *Holmes Appeal,* 379 Pa. 599, at 616, 109 A. 2d 523, 530 (1954).

[11] See e.g., Standard Juvenile Court Act, Sec. 1 (1959).

[10] See the facts of the instant case.

[act] for the child who may be abandoned as 'incorrigible' and for the society which has thus abandoned the child," [12] a "critical stage" of the proceeding as it is viewed from the perspective of ultimate trial in the adult court.[13]

Notwithstanding "unsettled and conflicting views" [14] "the trend in recent decisions", it may be observed, "is to hold that there shall be no greater diminution of the rights of a child, as safeguarded by the Constitution, than should be suffered by an adult charged with an offense equivalent to the alleged act of delinquency of the child." [15] In this light it does not seem inappropriate to view the Juvenile Court waiver as at least "a judicial finding of probable cause to believe the accused guilty" or in other words, "the finding of a magistrate in a proceeding under Rule 5, Fed. R. Crim. P., that there is probable cause to believe the defendant guilty of the crime charged against him" [16] i.e., as an act affecting liberty and requiring fundamental safeguards.

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[12] Bazelon, C.J., in *Watkins* v. *United States*, 343 F. 2d 278, 282 (D.C. Cir. 1964).

[13] Certainly it is as critical in the light of the facts of this case as the arraignment in Alabama or the preliminary examination in Maryland, respectively reviewed by this Court in *Hamilton* v. *Alabama*, 368 U.S. 52 (1961) and *White* v. *Maryland*, 373 U.S. 59 (1963).

[14] See Anno. 151 A.L.R. 1229.

[15] *Application for Johnson*, 178 F. Supp. 155, 160 (D.N.J. 1957). "[A] number of cases [which] have held that a juvenile is entitled to fundamental due process of law" have been listed by the Superior Court of Delaware, New Castle, in *Application of Naylor*, —— Del. ——, 207 A. 2d 1, 10 (1965) as follows: *In re Alexander*, 152 Cal. App. 2d 458, 313 p. 2d 182, 184 (1957); *In re Contreras*, 109 Cal. App. 2d 787, 241 p. 2d 631, 633 (1952); *Brewer* v. *Commonwealth (Ky.)*, 283 S.W. 2d 702, 703 (1955); *Cullins* v. *Williams*, 156 Ky. 57, 160 S.W. 733, 734 (1913).

[16] Bazelon, *J.*, for the Court in *Green* v. *United States*, 308 F. 2d 303 (D.C. Cir. 1962).

In divesting the child of the safeguards secured to it under the "exclusive jurisdiction" of the Juvenile Court, "waiver" is patently a penalty—in fact—the supreme penalty of the Juvenile Court.

It is understatement to suggest that the rights involved in proceedings of "waiver" are at least on a par with the rights involved in administrative adjudication affecting property. In the latter context, it is commonplace to note, that "[the] granting of a fair trial is the one *sine qua non* of administrative procedure. It is the one fixed criterion of judicial review." COOPER, ADMINISTRATIVE AGENCIES AND THE COURTS 149 (1951).

II.

The Petitioner Was Denied Due Process in the Proceedings in Juvenile Court Leading to Waiver of Juvenile Court Jurisdiction.

A. Petitioner was subjected to illegal arrest, detention, and coercive interrogation under Juvenile Court auspices. The net effect of these practices was not only the use of the petitioner as "the deluded instrument of his own conviction" [17] *but a shocking misuse of official power.*

The arrest and detention of the petitioner by the police were violative of District of Columbia law. D.C. Code § 11-912 (Supp. VIII, 1960).[17a] His interrogation—conducted in relays—was inherently coercive.

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[17] HAWKINS, PLEAS OF THE CROWN 595 (8th Ed. 1824).

[17a] The revised section, D.C. Code § 16-2306 (1963) has produced no substantive change.

Upon his placement in the "Receiving Home" after the first day of interrogation by the police, petitioner was placed in solitary confinement. He was returned to police headquarters after a sleepless night to undergo a second day of sustained interrogation.

During two days of interrogation at police headquarters petitioner, an adolescent victim of mental illness, was thus without counsel. As a consequence of such lack of assistance he furnished evidence against himself. It must be reiterated in this context that when counsel was retained for petitioner in the Juvenile Court during the second day of petitioner's interrogation at police headquarters, counsel was not informed that his client could be found in any place other than the Receiving Home for Children by the Social Service Director of the Juvenile Court who, in fact, handed him a brochure providing directions as to how to reach the Receiving Home. A "confession" was extracted from petitioner during this period of interrogation. While the "confession" itself was not offered in evidence, much of the prosecution cross-examination of defense psychiatrists at the time of the petitioner's trial suggests knowledge of data obtainable within that "confession" alone. It was also during this period that petitioner submitted to fingerprinting at police headquarters. These fingerprints were ultimately used against him in the District Court.

It is clear that petitioner's interrogation had turned accusatory long before the confession and corroborating data were obtained. Petitioner's right to assistance of counsel at that stage was surely not inferior to that of an adult, not suffering from mental illness. Cf. *Escobedo* v. *Illinois,* 378 U.S. 478 (1964). Yet that right was denied.

Independently of the violation of petitioner's various rights, as thus set forth, the totality of circumstances affect-

ing the petitioner's arrest, detention, interrogation, etc., presents a shocking misuse of official power vis-à-vis a child and a victim of mental illness. Cf. *Rochin* v. *California,* 342 U.S. 165 (1952); *Blackburn* v. *Alabama,* 361 U.S. 199 (1960); *Mapp* v. *Ohio,* 367 U.S. 743 (1961).

B. *Petitioner was waived by the Juvenile Court on the basis of "evidence"—withheld from the petitioner and his counsel—without a hearing, formal or informal—without a determination of his mental competency to participate in waiver proceedings and as a consequence of all of this without effective assistance of counsel.*

(1) *Secret Evidence.*

Petitioner demanded—but did not secure—the social records—clearly a determining factor—if not the outright basis of the decision of the Juvenile Court to waive jurisdiction. See *Kent* v. *United States,* 343 F. 2d 278 (D.C. Cir. 1964). As expressed by Bazelon, *C.J.,* for another panel of his Court:

> "All of the social records concerning the child are usually relevant to waiver since the Juvenile Court must be deemed to consider the entire history of the child in determining waiver. . . . Since an attorney has no certain knowledge of what the social records contain he cannot be expected to demonstrate the relevance of particular items in his request." *Watkins* v. *United States,* 343 F. 2d 278, 282 (D.C. Cir. 1964).

Clearly then without the benefit of such records counsel could not know what to supply, explain, or refute. This was unambiguously stated by petitioner's counsel at that

time. Without the social service file he declared he was unable "to study the data upon which a judicial decision as to waiver [would] be based" and consequently "[petitioner would] be denied effective assistance of counsel." See *Statement of the Case, supra.*

Reliance on the social records by the Juvenile Court in this case thus constituted the equivalent of the consideration of secret evidence of petitioner's unsuitability for treatment under Juvenile Court auspices. It bears repeating in this connection that this secret evidence included evidence of crime.[18] Use of this secret evidence—embodied in a dossier—prepared by a non-legal staff—is patently incapacitating to a child facing waiver. Whether or not afforded assistance of counsel at that stage—such a victim of secret inquisitorial procedures, would not know what to supply, explain, or refute.

Moreover, the Juvenile Court judge who depends on the dead letter of a dossier, i.e., the social record, reflective of evidence received "at second hand and in a distilled form at that" [19] is himself handicapped in decision-making.

Maximal procedural flexibility under administrative law still entitles "[a] party appearing before an agency . . . [to] insist that the agency advise him, by specific reference, of those parts of its general files and records on which it intends to rely in reaching a decision in the particular

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[18] Policy Memorandum in effect at the time of petitioner's case in Juvenile Court—it will be recalled—explicitly identified "prosecutive merit of the complaint" as a criterion of waiver. See Statement of the Case, *supra.*

[19] The language quoted refers to the secular inquisitorial procedure of the *Ancien Régime.* See Ploscow, *The Development of Present-Day Criminal Procedures in Europe and America,* 48 Harv. L. Rev. 433, 452 (1935).

adversary proceeding with which he is concerned. . . . [Moreover] to the extent that the agency's findings must be supported by the record of the proceedings before it, the agency is bound to introduce into the record at least enough of its information to afford substantial support for its findings." COOPER, ADMINISTRATIVE AGENCIES AND THE COURTS, 170-1 (1951).

(2) *No Hearing.*

Petitioner demanded but did not secure a hearing at which he could have presented his case against waiver, i.e., at which he could have adduced evidence to show that he was properly susceptible to rehabilitation under Juvenile Court auspices. Needless to say, a hearing could have been held meaningfully only upon the disclosure of the social records and on the further resolution of the question of petitioner's mental competency to participate therein, raised by the first medical affidavit, filed in Juvenile Court.[20] Neither condition had been satisfied in this case.

With all deference to a distinguished Chief Judge's view, we submit that the most plausible inference to be drawn from the record is that the Juvenile Court had acquired but

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[20] Bazelon, *C.J.*, with whom Wright, *J.*, concurred, dissented from a *per curiam* order granting petitioner's motion for leave to withdraw a petition for rehearing *en banc* in the Court of Appeals, declared:

> "As Judge Washington's concurring opinion recognizes, 'It is a fair inference from the record before us that one of the reasons why the Juvenile Court waived jurisdiction was because appellant was seriously disturbed and the Juvenile Court lacked facilities adequately to treat him.' I think it shocking that a child was subjected to prosecution and punishment as a criminal because he was thought to suffer from a serious mental or emotional disturbance." *Kent* v. *United States*, 343 F. 2d 247, 264 (D.C. Cir. 1965).

a superficial impression of petitioner's deteriorating mental state. Petitioner's doctors had but ventured tentative opinions and petitioner had not been examined by a psychiatrist at the behest of Juvenile Court at any time.

Petitioner in sum was denied rights viewed as essential to due process in actions affecting the disposition of property. See, e.g., *Mullane* v. *Central Hanover Bank and Trust Co.*, 339 U.S. 306 (1950); *Ohio Bell Telephone Co.* v. *Public Utilities Commission*, 301 U.S. 292 (1937); see also *Cooper, supra*, 149-249.

It appears insufficient to suggest, as did McGowan, *J.*, for the majority in this case in his Court, that Juvenile Court action denying a hearing could be justified on the theory that the Juvenile Court "administers a non-criminal process in the nature of social service work directed to the accommodation of the interests of the juvenile and of society." [21]

Rational or fair judgment—whatever the level of decision-making—depends on far more than good intentions. The most conscientious judge cannot act in an enlightened and hence fair fashion unless he has *all* relevant factual information brought to his focus of attention, where it is subject to competent and full assessment.

The "right to be heard"—in the context of Juvenile Court proceedings involving sanctioning such as probation

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[21] *Kent* v. *United States*, 343 F. 2d 247, 258 (D.C. Cir. 1965). In the instant case, the Court of Appeals further relied on its earlier decision of *Wilhite* v. *United States*, 281 F. 2d 642 (D.C. Cir. 1960) which denied the existence of a right of a hearing in advance of waiver. The case seems distinguishable from the one at the bar.

or institutionalization under Juvenile Court auspices has in fact been widely recognized.[22]

The District of Columbia has been conspicuous among supporters of that right in that context.[23]

A major beginning moreover has been made to effect national recognition of the "right to be heard" in waiver proceedings.[24] The significance of such a right to due process is underscored by the facts of this case.

(3) *Loss of Effective Assistance of Counsel.*

In the maelstrom of waiver proceedings in the instant case the protective role of counsel—a counsel denied essential information—was in fact illusory.

Outside the waiver context, the "right to be heard" in Juvenile Court proceedings has been held to comprehend

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[22] The trend, as previously noted, has been toward the adoption of a standard of fundamental fairness for Juvenile Court proceedings involving institutionalization or probation under Juvenile Court auspices. See cases cited in *Application of Naylor, supra,* at 207 A. 2d at 10. See also *In Re Mantell,* 158 Neb. 900, 62 N.W. 2d 208 (1954).

At least one state court has viewed a hearing necessary for a valid transfer of jurisdiction from Juvenile to Adult Court, under state law authorizing such transfer, though that law was silent on the necessity of a hearing. See *Childers* v. *Commonwealth,* 239 S.W. 2d 255 (Ky., 1951).

National Council of Juvenile Court Judges, Comparative Study of Juvenile Court Systems (1964), provides further detail on various state statutes on this score. Section 13 of the *Standard Family Court Act* prepared by the Committee on the Standard Family Court Act of the National Probation and Parole Association in cooperation with the National Council of Juvenile Court Judges and the U.S. Children's Bureau in 1959 requires a full investigation and *hearing* prior to waiver.

[23] *Shioutakon* v. *District of Columbia,* 236 F. 2d 666 (D.C. Cir. 1956).

[24] See materials in footnote 22, *supra.*

"effective assistance of counsel", as a matter of fundamental fairness.[25]

Within the context of waiver proceeding themselves, "the right to effective assistance of counsel" is yet to be successfully claimed in this Circuit on any grounds.[26]

The acceptance of such a claim is overdue under the Sixth Amendment as made obligatory on state and local jurisdictions under the due process clause. See *Escobedo* v. *Illinois,* 378 U.S. 478 (1965); *Gideon* v. *Wainwright,* 372 U.S. 335 (1963).

III.

Statutory Safeguards Against Improvident Juvenile Court Action Through Waiver or Otherwise Were Denied to the Petitioner.

A. *Petitioner was denied the right of "full investigation" in advance of waiver.*

Congress has vested in the Juvenile Court of the District of Columbia "exclusive jurisdiction" over children charged with offenses which would constitute felonies or misdemeanors if committed by adults. D.C. Code § 11-907 (1951).[26a]

A child between 16 and 18 charged with an offense constituting a felony, or a child of any age charged with an

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[25] *Shioutakon* v. *District of Columbia, supra.*

[26] The Juvenile Court of the District of Columbia has not heretofore appointed counsel for indigent juveniles, facing waiver of jurisdiction. *Cf.* the requirement of this Court for the adult facing criminal charges in *Gideon* v. *Wainwright,* 372 U.S. 335 (1963).

[26a] The revised section—D.C. Code § 11-1551 (1963) provides no substantive change.

offense punishable by death or life imprisonment may, however, be tried as an adult accused of a crime, *but only* if after *"full investigation"* the Juvenile Court waives jurisdiction. D.C. Code, § 11-914 (1951). That section provides in full:

> "If a child sixteen years of age or older is charged with an offense which would amount to a felony in the case of an adult, or any child charged with an offense which if committed by an adult is punishable by death or life imprisonment, the judge may, after full investigation, waive jurisdiction and order such child held for trial under the regular procedure of the court which would have jurisdiction of such offense if committed by an adult; or such other court may exercise the powers conferred upon the juvenile court in this Act in conducting and disposing of such case."

The necessity for an investigation which is truly "full" is emphasized by the disparity in the potential consequences to the child if he remains within the rehabilitative protection of the Juvenile Court or if he is relegated to adult criminal law. In this case, having been charged with rape, housebreaking and robbery, waiver of jurisdiction over petitioner exposed him to the risk of punishment of "death by electrocution" and in fact resulted in the imposition of a ninety year term of imprisonment.

The statute requires a "full investigation". That obviously means an inquiry not only into the facts of the alleged offense but also into the question whether the *parens patriae* plan of procedure is desirable and proper in the particular case. *Pee* v. *United States,* 274 F. 2d 556, 559 (D.C. Cir. 1959); *Shioutakon* v. *District of Columbia, supra.* See also,

D.C. Code, § 11-902 (1951). Exercise of the power of waiver must fit this purpose. It "permits the Juvenile Court to determine *which children will be amenable to the treatment resources at its disposal* and to transfer its jurisdiction in cases demanding such action." H. Rep. No. 242, 80th Cong., 1st Sess., 2 (1947) (emphasis supplied). An investigation to be "full" must therefore embrace all factors relevant to a determination by the Juvenile Court whether or not the child "will be amenable to the treatment resources at its disposal. . . ."

The Court of Appeals in turn has held explicitly that "the waiver of Juvenile Court jurisdiction, upon which District Court jurisdiction attaches, *depends* upon a 'full investigation' by the Juvenile Court". *Green* v. *United States,* 308 F. 2d 303 (D.C. Cir. 1962). It has said that "what is required before a waiver is . . . 'full investigation' ". *Id.,* 305. And full investigation, it has stated "prevents the waiver of jurisdiction as a matter of routine for the purpose of easing the docket. It prevents routine waiver in certain classes of alleged crimes. It requires a judgment in each case based on 'an inquiry not only into the facts of the alleged offense but also into the question whether the *parens patriae* plan of procedure is desirable and proper in the particular case.' " *Ibid.*

It would seem strangely inconsistent with the basic philosophy of the Juvenile Court law if an investigation conducted by Juvenile Court were not to comprehend a psychiatric examination at least upon the presentation of some *prima facie* evidence of mental unsoundness. A number of state Juvenile Court statutes have in fact explicitly required a mental examination preliminary to waiver of jurisdiction. (See, *e.g.,* Sec. 2151.26, *Page's Ohio Rev. Code Ann.,* providing that the full investigation in advance of

waiver of jurisdiction by a Juvenile Court shall include "a mental and physical examination of such child . . . by the Bureau of Juvenile Research, or by some other public or private agency, or by a person qualified to make such examination. . . .") This specificity simply makes explicit what is clearly implicit in any Juvenile Court statute. Congress does not have less solicitude for the child and less enlightenment as to the need for an inquiry into mental health than does the Ohio Legislature.

An apt expression of Juvenile Court philosophy throughout the nation has been provided in these words:

> "The Children's Court, if it is to perform the high purposes for which it was created, to wit, the rehabilitation of children brought before it, and the salvation of child life, must take into consideration, not only the bare and apparent facts, but must go behind the facts and inquire as to the causative factors productive of those facts." *In re XYZ,* 24 N.Y.S. 2d 456.

The actual practice in the District of Columbia in the case of an adult charged with an offense makes the uncontradicted allegation of the existence of a mental disorder, even when made by laymen, sufficient to warrant the granting of a mental examination in an adult proceeding. The duty of the Court under those circumstances is "to grant the motion and order appropriate 'mental examination.'. . ." See e.g., *Lloyd* v. *United States,* 247 F. 2d 522 (D.C. Cir. 1957).

Yet in this case the Juvenile Court spurned information on the vital subject of petitioner's mental health and at no time proceeded to make its own independent determination as to the nature of the mental illness which it itself admitted was probable. An uncontroverted affidavit of a

psychiatric expert submitted by petitioner, had informed the Juvenile Court that petitioner was a victim of severe psychopathology and that a complete investigation of the psychological and social factors of his case was impossible without placing him in a hospital situation for psychiatric observation. Such an examination was feasible. The Juvenile Court was informed, and this Court may judicially notice, that "adequate psychiatric facilities in the handling of . . . [petitioner were] available to the Juvenile Court in the D.C. General Hospital, which has an in-patient department specializing in the care of children and adolescents". See *motion to dismiss indictment and accompanying affidavits.* Thus the Juvenile Court was apprised of the need for and the availability of a careful inquiry into petitioner's mental health. Without it the Court could not have received responsible and reliable information as to either the petitioner's then existing state of mental health or *as to the prospect of his rehabilitation with proper care.* Yet no such inquiry was conducted.

To this day, in fact, there has been no inquiry as to the prospects of petitioner's rehabilitation with proper care, a subject crucial to a rational determination as to waiver.

B. *Petitioner was denied the right of inspection of relevant social records in the possession of the Juvenile Court.*

Juvenile Court was duty bound to make the social records available to counsel. D.C. Code § 11-929(b) (Supp. VIII, 1960) explicitly directs that:

> "The records made by officers of the court pursuant to sections 11-908 and 11-924, referred to in this section as social records, shall be withheld from indiscriminate public inspection, except that such records or parts

> thereof shall be made available by rule of court or special order of court to such persons, governmental and private agencies, and institutions as have a legitimate interest in the protection, welfare, treatment, and rehabilitation of the child and to any court before which any such child may appear. The judge may also provide by rule or special order that any such person or agency may make or receive copies of such records or parts thereof. No person, agency, or institution which has received records or information under this section may publish or use them for any purpose other than that for which they were received." [27]

To furnish the records to counsel is of course not to exhibit them to "indiscriminate public inspection." On the contrary, it is to supply them precisely to the person to whom the statute mandates disclosure. For the records *"shall be made available* by rule of court or special order *to such persons . . . as have a legitimate interest in the protection, welfare, treatment, and rehabilitation of the child. . . ."* (Emphasis supplied.) The child's counsel is just such a person.[28]

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[27] *Cf.* disposition of *Watkins* v. *United States, supra.* We note again that the revised D.C. Code § 11-1586(b) produced no substantive change.

[28] The requirement of disclosure was added by an amendment enacted in June 12, 1952, 66 Stat. 134, for the very purpose of removing the seal of secrecy when the records were sought by those having a legitimate interest in them. H. Rep. No. 1937, 82d Cong., 2d Sess. (1952); S. Rep. No. 1195, 82d Cong., 2d Sess. (1952); 98 Cong. Rec. 1305. There can of course be no doubt as to the legitimate interest of the child's counsel.

Compare S. Rep. No. 530, 75th Cong., 1st Sess., 4 (1937); "Privacy of hearings is provided, but the definition of privacy does not exclude any person having a legitimate interest in the case, including legal counsel. The public in general, and morbid curiosity seekers in particular, alone are excluded."

C. Petitioner was denied immunity from fingerprinting, detention and interrogation at police headquarters.

Congress has explicitly recognized that "no public record may be made of a child's contact with Juvenile Court. D.C. Code § 11-929(c) declares beyond any possibility of misunderstanding:

> "It shall be unlawful for any person or persons to disclose, receive, or make use of, or authorize, knowingly permit, participate in, or acquiesce in the use of any information concerning any juvenile before the court, *directly or indirectly* derived from the records, papers, files or communications of the court, *or* acquired in the course of the performance of official duties." [28a] (Emphasis supplied.)

Since the petitioner's arrest by the police could be founded only on "the performance of official duties" concerning a juvenile subject to the jurisdiction of the Juvenile Court, the transmission of his fingerprints to the prosecution flouted the Congressional enactment.

A juvenile, subject to the exclusive jurisdiction of the Juvenile Court, is assured of anonymity as a general condition of the constitutionality of all phases of the Juvenile Court proceedings. See *e.g., Pee* v. *United States,* 274 F. 2d 558 (D.C. Cir. 1959). The fingerprinting of a juvenile under the aegis of the Juvenile Court destroys the anonymity secured to him under law without compensating him for such loss or for that of the traditional constitutional safeguards available under the adult law.

[28a] Again—the revised section, D.C. Code § 11-1586(c) (1963) produced no substantive change.

Congress has further prescribed the procedure to be followed after taking a child into custody—again flouted in petitioner's case. D.C. Code Ann. § 11-912 (1960) governing the arrest of a juvenile provides as follows:

> "Whenever any officer takes a child into custody, he shall, unless it is impracticable or has been otherwise ordered by the court, accept the written promise of the parent, guardian, or custodian to bring the child to court at the time fixed. Thereupon such child may be released in the custody of a parent, guardian or custodian. If not so released, such child shall be placed in the custody of a probation officer or other person designated by the court, or taken immediately to the court or to a place of detention provided by the Board of Public Welfare, and the officer taking him shall immediately notify the court and shall file a petition when directed to do so by the court."

It seems clear that Congress sought to avoid, not encourage the police activities directed at the petitioner in this case.

[28b] Revised D.C. Code § 16-2306 (1963) provides no substantive change.

IV.

The District Court—Clearly Without Jurisdiction Over the Petitioner in the Light of I. to III. Above as an Adult Court Did Not Even Hold a Token Hearing as to the Uncontroverted Allegations of Improper Waiver—or as to the Desirability or Necessity of Constituting Itself a Juvenile Court Under the Authority of the D.C. Code—But Compounded Existing Prejudice by Its Own Brand of Unfairness Against the Petitioner.

The District Court denied petitioner a hearing as to the allegations constitutive of improper waiver by the Juvenile Court notwithstanding appropriate offers of proof. *Transcript of Proceedings Before Chief Judge McGuire,* Feb. 8, 1963, pp. 16 and 21.

It denied petitioner's motion to constitute itself a Juvenile Court—a matter within its statutory power—again without hearing and even without legal argument and declared that it was doing so "with emphasis". *Transcript of Proceedings Before Chief Judge McGuire,* Feb. 5, 1963, p. 16 and Feb. 8, 1963, p. 21. See also D.C. Code § 11-914 (1951). Cf. D.C. Code § 11-1553 (1963).

It declared that a "stimulated activity", attributed to the National Institute of Health and the Washington School of Psychiatry consisting of providing psychiatrists to an otherwise indigent petitioner would "get [someone] in serious trouble". *Proceedings Before Chief Judge McGuire,* Feb. 18, 1963, p. 26.

It suffered denigration of defense psychiatrists in open court. *Id.,* 27-28 (T. 743-45, 764-66). It suffered denial by the Jail authorities of a defense psychiatrist's request

to examine his patient. *Affidavit of Dr. Warren C. Johnson in District Court.*

It ordered petitioner's trial counsel—almost on the eve of trial—to "advise" the Court about the activities of the suspect Washington School of Psychiatry—by the end of the week for no reason apparent within the record other than that institution had helped furnish petitioner with psychiatrists at no cost to himself. *Proceedings Before Chief Judge McGuire,* Feb. 18, 1963, pp. 28-29.

It destroyed in sum any atmosphere susceptible of tolerance of the unorthodox in the petitioner's defense and as a consequence denied him due process.

V.

The District Court Committed Reversible Plain Error, Affecting Substantial Rights, by Admitting into Evidence and Permitting Reference to Fingerprints Taken From Petitioner by the Police While Petitioner Was Under the Exclusive Jurisdiction of the Juvenile Court.

The fingerprinting of the petitioner by the police took place on two occasions while petitioner was a ward of the Juvenile Court—once two years before—the second time immediately after the arrest in the instant case. On each occasion petitioner—held without legal representation—was under the "exclusive jurisdiction of the Juvenile Court."

It is difficult to conceive of the creation of any more definite and damaging a record—from the standpoint of the future welfare of the child—than the fingerprinting of such child and the inclusion of such fingerprints within the criminal files of the Police Department.

It follows that upon this score alone the use of fingerprints in the adult proceedings in District Court constituted reversible plain error as practice subversive of the protective scheme of the Juvenile Court law.

Even if the fingerprinting in the instant case be viewed as not explicitly barred under law, the disclosure of such fingerprints in District Court or elsewhere is barred under the express mandate of the Juvenile Court law. It must be recalled that these fingerprints were taken while petitioner was under the exclusive jurisdiction of the Juvenile Court—either as information which was part and parcel of the juvenile's files or otherwise "in the course of the performance of official duties." On this point the statute is explicit. The disclosure of fingerprints as part of any information concerning the juvenile which is "directly or indirectly derived" from the "records, papers, files, or communications of the [Juvenile] court *or* [which is] *acquired in the course of the performance of official duties,*" is expressly prohibited under the Juvenile Court law. D.C. Code § 11-929(c). (Emphasis supplied.) Such disclosure, moreover, is punishable by fine and/or imprisonment. *Ibid.*[28c]

The Juvenile Court has never engaged in the fingerprinting of juveniles under its jurisdiction. Were it to have done so—it would have violated the inherent purpose of the Juvenile Court law. Had it acquired such fingerprints by any manner or means or from any source it would be explicitly barred by statute from transmitting or disclosing them on any level. D.C. Code § 11-929(c). Congress has not intended to provide the police with authority it has explicitly denied the Juvenile Court. It is self-evident

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[28c] Revised D.C. Code § 11-1586(c) is substantially identical.

that insofar as the action of the police in the instant case has any color of authority it was derived from the authority of the Juvenile Court law. Under that law the use of such fingerprints in District Court under the facts of this case was plainly illegal.

Both instances of fingerprinting of petitioner, moreover, are also subject to a further taint of illegality. The fingerprints were obtained in the course of the detention of petitioner by police—without authority of the Juvenile Court—in the face of the statutory command that such juvenile upon arrest be placed within the custody of designated persons, not including the police. D.C. Code Ann. § 11-912 (1960).

Without the benefit of any statutory prohibition, the Court of Appeals for the D.C. Circuit held fingerprints obtained in the course of an illegal arrest and detention subject to exclusion in the District Court. As expressed by the United States Court of Appeals for the District of Columbia Circuit:

> "True, fingerprints can be distinguished from statements given during detention. They can also be distinguished from articles taken from a prisoner's possession. Both similarities and differences of each type of evidence to and from the others are apparent. But all three have the decisive common characteristic of being something of evidentiary value which the public authorities have caused an arresting person to yield to them during illegal detention. If one such product of illegal detention is proscribed, by the same token all should be proscribed." *Bynum* v. *United States,* 262 F. 2d 465 (D.C. Cir. 1958).

The extensive character of the violation of both constitutional and statutory rights of the juvenile through his fingerprinting and the subsequent use of his fingerprints to secure his conviction in the District Court requires reversal as plain error affecting substantial rights. Rule 52(b) F.R.Cr.P., Cf. *Mapp* v. *Ohio,* 367 U.S. 743 (1961).

We again invite the attention of the Court to the fact that a revision of the Juvenile Court Act, not in effect at the time of the petitioner's proceedings in Juvenile Court, was enacted by Congress and became law December 23, 1963. Pub. L. 88-241. This revision has not made any substantial changes affecting the rights of juveniles.

VI.

The District Court Erred in Failing to Grant Petitioner's Motion for Judgment of Acquittal on All Counts, Especially on the Ground of Insanity.

Against all the psychiatric, psychological and lay evidence offered by the defense, the prosecution offered the testimony of but two expert witnesses in rebuttal. To sustain its burden, the prosecution called Dr. David J. Owens and Dr. John R. Kavanagh. On the first issue Dr. Owens testified that the defendant was suffering from a mental disease on the date of the alleged commission of the acts charged against him, i.e., "schizophrenic reaction, chronic undifferentiated type" (T. 672). On this issue Dr. Kavanagh testified substantially as follows: "I decided that he did not have a mental disease" (T. 690).

However, this witness also testified that the defendant was suffering from a "form of sexual perversion and transvestism" (T. 700); that the defendant had a nervous mani-

festation "sometimes referred to as an irritable or spastic colon" (T. 701); that the defendant had schizoid tendencies (T. 702); that "I hope I haven't given the impression" that the defendant is a normal individual (T. 704); that the defendant has a schizoid personality (T. 705); that in his opinion a personality disorder in which the schizoid personality would be included does not represent a disease in either the terminology used by the Court or the terminology used by psychiatrists (T. 706); that the defendant's withdrawal during the examination of him "was one of the manifestations of the symptoms of schizophrenia" (T. 708); that some of the things done by defendant constitute a form of sexual perversion and "it would come in the classification of sociopathic personality disturbances in which sexual perversion is a sub-variety. So it is my opinion it would be evidence of a personality disorder rather than a disease" (T. 710); that he was familiar with the Diagnostic and Statistical Manual of Mental Disorders of the American Psychiatric Association and personality disorder was a valid classification of mental diseases and disorders when listed in said Manual (T. 710); (Such personality disorders are in fact listed as mental disorders within that Manual.) that other conduct exhibited by defendant is also evidence of a personality disorder (T. 711); that "It is my feeling that in my examination I did not find anything more than a schizoid personality and granted perhaps a schizoid personality may go ahead and become schizophrenic, I found no evidence of schizophrenia" (T. 718); that he would classify the schizoid personality as a personality disorder (T. 719); that it is so classified in the Statistical Manual (T. 705); that the psychological tests given petitioner by Dr. Bernard Levy (who testified for defense) indicated that the defen-

dant was suffering from schizophrenia, undifferentiated type (T. 725).

It thus follows, that the prosecution failed to establish beyond a reasonable doubt that the petitioner had no mental disease or defect at the times of the alleged commission of the offenses charged. As interpreted by the Court of Appeals, the concept of disorder included any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavior controls. See *McDonald* v. *United States,* 312 F. 2d 347 (D.C. Cir., 1962).

To sustain its burden of proof beyond a reasonable doubt on the issue that although the accused was defective or diseased, his alleged acts were not the product of his affliction, the prosecution produced the testimony of only one witness, Dr. Owens, *supra,* to rebut the testimony of the defense.

In answer to hypothetical questions not based upon admitted facts or upon facts disclosed in the record asked by the prosecutor, this witness gave conflicting testimony with reference to productivity with relation to the robbery counts. The questions were based on the assumption that the petitioner allegedly first committed robbery in each of the premises prior to committing the alleged assaults. These do not appear to be the facts as disclosed in the record, and therefore such testimony would seem of no value and inadmissible.

The witness was asked the improper hypothetical questions four times (robbery first) and his answer the first time regarding the alleged Echols robbery was that "assuming the information that you gave me, I would say that schizophrenia was not—did not cause the robbery

itself" and "I would have no opinion about the housebreaking" (T. 674); in answer to the improper question regarding the alleged Palmer robbery, the witness answered "Probably not"; in answer to the improper question regarding the alleged Murphy robbery, the witness answered "The robbery was probably not, assuming the information that you gave me" (T. 676). In answer to the same improper questions asked the second time by the prosecutor of this witness regarding all three alleged robberies, the witness testified "If the primary motivation were robbery or to get something to eat, then this would not be connected with the sexual pre-occupation which was in turn a symptom of his illness. This is the reason I have difficulty in arriving at a firm opinion as to the productivity" (T. 678). The witness answered the hypothetical improper question regarding the three alleged robberies asked by the prosecutor for the third time by testifying "I would say his primary motivation was robbery. Because this is the first thing that he did. It is very simple and I can answer this is what he did first. This is assuming that this is correct, his motivation was accomplished by his first act when he entered" (T. 680). On cross examination, the witness testified on the productivity regarding the robbery counts *"I think my opinion is still that I don't have a firm opinion one way or the other"* (T. 683). On redirect the prosecutor was permitted by the Court to ask the improper hypothetical question regarding the robberies of this witness for the fourth time, and he testified "I would say that from the information that you have just given, if this is correct, then I cannot see a connection between a robbery and his illness" (T. 688).

It should be noted that the prosecutor aggravated this situation by twice stating to the jury in his arguments that the three robberies occurred prior to the assaults.

As an expert witness, the witness is permitted to testify to his inference from facts. His opinions are what is sought. And these opinions must be based upon facts he has himself observed, or facts he has heard others relate, or on hypothetical facts presented to him. His purpose is to give educated conclusions based upon fact. *Blunt* v. *United States,* 244 F. 2d 355 (D.C. Cir. 1957).

It seems obvious that the opinions given by this witness regarding productivity on the robbery counts was of no value and inadmissible because they do not appear to be based upon admitted facts or upon facts within his knowledge disclosed in the record. These opinions were not admissible in evidence for the same reason.

Surely even if these opinions on the robbery counts were to be assumed to have been based on facts disclosed in the record, it is clear that they cannot sustain the government's burden of proof as to petitioner's mental state.

It is further obvious that this witness did not rebut or attempt to rebut the productivity regarding the housebreaking counts in any substantial manner.

The judgment in this case must therefore be set aside. It seems clear beyond question that at the close of all the competent evidence a reasonable mind must necessarily have had a reasonable doubt as to the sanity of accused at the times the alleged acts were committed, and that if said acts were committed by him, they were the product of his mental disease. The trial judge should therefore at the conclusion of the case have directed a judgment of acquittal by reason of insanity. *Isaac* v. *United States,* 284 F. 2d 209 (D.C. Cir., 1960); *Curley* v. *United States,* 160 F. 2d 209 (D.C. Cir., 1947).

VII.

The District Court Further Committed Reversible Plain Error Affecting the Substantial Rights of Petitioner When It Gave the Jury the So-called "Allen" or "Dynamite" Charge Before the Jury Retired to Consider Its Verdict.

It must be remembered that a principal defense to all the counts in the indictment was insanity, and it appears from the verdict of not guilty by reasons of insanity on two counts and guilty on the other six counts, that the jury rendered a compromise verdict.

It must further be remembered that in *Allen* the charge was given to the jury after the main charge was delivered, and when the jury had returned to the Court apparently for further instruction. No brief was filed on behalf of Allen in the Supreme Court. *Allen* v. *United States,* 164 U.S. 492 (1896).

The charge given here went beyond the "Allen" charge. Here, the trial court gave the jury before it retired to consider its verdict the substance of the "Allen" charge plus the Supreme Court's comments on this instruction, and further added "It is your duty to decide this case if you can conscientiously do so".

The trial court here was not authorized to tell the jury, at any stage of the trial, that they must agree or agree by compromise. This peremptory order to arrive at a verdict is logically inferred from the charge, and is plain coercion and an invitation by the Court of the province of the jury. The charge also expressly or impliedly suggested that the jury compromise in order to arrive at an agreement.

All of this resulted in an improper direction or coercion by the trial court, and for this reason alone the verdict must be vacated on this appeal.

As stated in *Green* v. *United States,* 309 F. 2d 852 (Fifth Cir. 1962):

> "The Allen or 'dynamite' charge is designed to blast loose a deadlocked jury. . . . This is the outermost limits of its permissible use. The jury system rests in good part on the assumption that the jurors should deliberate patiently and long, if necessary, and arrive at a verdict—if, but only if, they can do so conscientiously. It is improper for the Court to interfere with the jury by pressuring a minority of the jurors to sacrifice their conscientious scruples for the sake of reaching agreement."

In *Powell* v. *United States,* 297 F. 2d 318 (Fifth Cir. 1952) the Court said:

> "It is implicit in the decisions of the Supreme Court dealing with the Allen case, e.g., Burton v. United States, 196 U.S. 283, 25 S.Ct. 243, 49 L.Ed. 482, and Brasfield v. United States, 1926, 272 U.S. 448, 47 S.Ct. 135 (71 L.Ed. 345), that the Fourth Circuit was correct in its recent holding (In United States v. Rogers, 1961, 289 F. 2d 433, 435-37) 'that the Allen charge, itself, approaches ultimate permissible limits * * *' in handling situations similar to that facing the court below."

In *Shaffman* v. *United States,* 289 F. 370, 375 (Third Cir. 1923) the Court said:

> "If the charge as a whole, upon a fair and reasonable interpretation, had, or was calculated to have, the

effect of coercing the jury into rendering a compromise verdict, the judgment must be reversed."

In the case here, the dynamite exploded before there was any reason to think that blasting was necessary. Even if the trial judge had given the charge after the jury had retired, the charge would have exceeded the permissible limits to which the Court might go in its endeavor to influence the jury towards the rendition of a verdict. The vice in the charge here was the Court's interference with the jury function. No matter when the charge was given, it gave the jury false notions of the validity and force of majority opinion; and it prejudiced the right of the petitioner to a hung jury and a mistrial by tending to stifle the dissenting voices of minority jurors.

Conclusion

By virtue of the foregoing the judgment of the Court of Appeals should be reversed and the case remanded for the trial of petitioner as a juvenile under D.C. law, or in the alternative, with directions to enter a judgment of acquittal by reason of insanity.

Respectfully submitted,

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APPENDIX A

The following is a chronological summary of District Court proceedings upon trial of this case:

The prosecution called a number of witnesses in its attempt to establish the guilt of defendant on the indictment. The first witness called by the prosecution was Juanita A. Echols (T. 28) who testified that in the early morning hours of June 5, 1961 she lived alone in apartment 508, 5th floor of 2153 California Street, N.W., Washington, D.C.; that there was a fire escape leading to the kitchen window of said apartment; that she was awakened at approximately 1:00 in the morning by a figure who leaped on her couch and grabbed her; that she started screaming, told the person her billfold was on the dresser, and he dragged her over to where the billfold was and which contained $12.00; that he put the wallet in his pocket, dragged her back to the couch and had sexual intercourse with her. The prosecutor then informed the court as follows (T. 36):

> "May I inform the Court and counsel of something in regard to this witness here. At a subsequent point of time a man named, I think, Lanham, was picked up and put in the lineup and viewed by this defendant, by this complaining witness, and she was unable to identify Lanham. At a subsequent point of time a man whose name I think was Thurston, both of these were Negro males, was put in a lineup and she identified Thurston as the person who had been in her apartment. Thurston was not in fact the person who was in there."

That she was not able to identify the person who was in her apartment (T. 47-48), that she later identified a man at a police lineup as the intruder who was not the defendant. The witness never testified she failed to give consent to the alleged conduct of the intruder.

The prosecutor next called as witnesses Dr. Helms, then Officer Allen, then Officer Carlson, then Officer Kline, then

FBI laboratory agent Cornelius G. McKnight, all of whom gave testimony tending to show there was an act of intercourse had by the complaining witness with a male on June 5, 1961.

The prosecutor then called as a witness Officer John Becker, Identification Bureau of Metropolitan Police Department (T. 76) who testified that on June 5, 1961, after midnight he developed four latent fingerprints which were on the window ledge of apartment 508; that one of the four was identical with the rolled print of No. 9 finger of petitioner (taken from petitioner after his arrest); that there were some latent fingerprints of others on the same window ledge which the witness never attempted to identify (T. 91-92).

The prosecution then called Gloria Jean Palmer as a witness (T. 96) who testified that in the early morning hours of June 12, 1961 she shared apartment No. 303, 1311-30th Street, Northwest with one Constance Walsh who did not testify; that about 1:30 in the morning she was awakened by a hand over her mouth; that she screamed and the individual went out the door; that she was not able to identify the alleged intruder; that after the police visited her apartment, they asked her to check and see if anything was missing (T. 103); that she then discovered her wallet with $47.00 in it was missing; that she thereafter saw smudge prints on the wall; that she cannot identify the petitioner as the intruder (T. 107); the Court denied defense counsel's motion to strike the testimony of this witness (T. 108).

The prosecution then called Officer William R. Holden as a witness, (T. 108) and he testified he saw several smudges on the wall of said apartment when he inspected same.

The prosecution then called Officer James Jones, of the Identification Bureau as a witness (T. 111) who testified he examined smudge marks in the hallway of the premises; that he developed a latent fingerprint which was on the closet door located in the hallway of the apartment; that he compared this print with the rolled print taken from

petitioner as heretofore described, and they were similar.

The prosecution then called Mary L. Murphy as a witness (T. 131) and she testified that in the early morning hours of September 2, 1961 she lived alone in apartment 307, 1717 20th Street, N.W.; that the living room window led out to the fire escape; that her wallet containing $12.00 was about seven feet from her bed, near the kitchen; that she was awakened by someone's hand on her neck; that such person said, "If you are not quiet, I will kill you;" that "I lay quiet and he raped me;" that she then called the Metropolitan Police Department; that after detectives arrived, she did not look around the apartment (T. 142); that after the officers came from No. 3 Precinct, "I found my wallet was gone with the $12.00;" (T. 144) that the petitioner was the person who raped her (T. 148).

The prosecution then called officer Robert M. Boyd, third precinct, as a witness, and he testified he responded to the premises at approximately 4:45 A.M. on September 2, 1961, and he described the appearance of Miss Murphy (T. 152-161).

The prosecution then called police woman Ernestine Johnson as a witness (T. 162) and she identified Murphy's night gown.

The prosecution then called detective Wolfgang as a witness (T. 164) and he testified he visited Murphy's apartment after 5:00 A.M. September 2, 1961, and identified photographs of the interior of the apartment and certain articles taken by him from there, and that he took some of the items with another officer to the FBI laboratory; that he saw and talked to Murphy on this visit; that he and other officers placed defendant under arrest about 3:00 P.M. September 5, 1961 (T. 178) at home of defendant 1823 S Street, N.W., that Murphy first gave description of her assailant as a Negro between the ages of 25 and 30 (T. 180).

The prosecution then called FBI agent Allison C. Semmes as a witness (T. 182) and he testified regarding the articles turned over to him from the Murphy apartment.

The prosecution then called Officer Robert H. De Milt as a witness (T. 189) and he testified he visited the Murphy premises at 8:00 A.M., took a table from the fire escape to the identification bureau at police headquarters (T. 194) after a latent fingerprint appeared on the top step of the table.

The prosecution then called police Sergeant Hayden of the Detective Identification section as a witness (T. 196) and he testified he rolled the prints of defendant on Sept. 5, 1961 after defendant was arrested in this case; that he lifted a latent fingerprint from the table taken from the Murphy apartment and it compared with the rolled print he took of defendant (T. 206) that he could not state how long the latent fingerprint had been on the table.

The prosecutor then volunteered to the Court that Echols identified another person, not the defendant, from a photograph as the intruder, but could not identify that person when seen in a lineup (T. 213). The prosecution then rested its case (T. 215).

Counsel for defendant then moved for judgments of acquittal on all counts of the indictment (T. 215) and said motions were overruled.

The defendant then called as a witness Mrs. Courtney T. Kent, the defendant's mother and she testified that when the defendant was 2 years old he witnessed his father attempting to choke her to death (T. 218); that immediately thereafter he became very nervous and would run and hide from his father; that his behavior changed and "he would be in a trance" (T. 220) that at times his teacher "couldn't get him to hear her. He repeated his grades" (T. 220); that "he couldn't control his bowels up until they picked him up at the age of sixteen"; that when he was sixteen "someone gave him a lovely puppy and he carried it off and killed it. But he grieved so after it"; that he would cover the windows in his room "because he said voices would tell him to do things and he couldn't help himself. They would tell him to go down and look at the television and after he went down there, he said they told him to go out in the

street, and he couldn't help himself." (T. 221); that her son would talk when no other persons were around "and I would ask him what he was saying; and he said, "Don't bother me; and so many different times I tried to talk to him and he didn't hear me. He couldn't hear the doorbell ring at times. At times, he was in a deep study" (T. 221); that when the defendant was in the Receiving Home at the age of 14 charged with committing an offense, he told her "he didn't understand it and he hoped God would take care of him because it was going to happen again soon and he just didn't understand it" and "Please, Mama, get a psychiatrist for me because I don't understand." (T. 222-223); that he would have nightmares and "he would rise up in bed reaching for something all the time when I would awaken him. He would act as if he was reaching from something. And he said something was always after him and talking to him" (T. 225); that she questioned him about these voices "and he said, Mama, they talk to me when I am walking along the street, and they tell me to run in a lady's house or on a porch and then the police want to pick me up when they catch me running" (T. 225); that he was disturbed all the time; that "he would sit down and didn't say anything to anyone and he just seemed to be deaf, and then he would have these fits and he broke up things in the house at times and then he was sorry afterwards" (T. 227).

The defendant then called Thomas C. Cope as a witness (T. 241) who testified he was a high school teacher and uncle of defendant; that he observed behavior of teenage boys in his school and also the behavior of defendant, and found defendant "to be an individual of abnormal behavior" (T. 243); that:

> "I have him to do little chore jobs like raking leaves at my country place and I have found him standing with his hand on the rake and laughing and talking to himself, and I have called him and approached him until I would get within about two or three feet of him where I could tap him on the shoulder before I could

get his attention. And then when I did get his attention, he would say 'Oh, Uncle Tommy; Oh, Uncle Tommy, I am doing it.'"

"Then on one other occasion, I had him to scrub the porch. I got the hot water, gave him the soap powder and started him to scrub the porch. About ten minutes later, I came around the house to see what he was doing and he was just standing up looking and I said, 'What are you doing?' And he said, 'Oh, I am through scrubbing the porch.' Well, he hadn't even started, practically, to scrub the porch.

"On the third occasion, I had him raking up some apples in the rear portion of my orchard and he raked about a half a dozen apples and I walked around to the side of the house to observe him and I saw him motioning to something and talking and mumbling as if he was striking at something. And then I walked closer to him and he said 'Get away from here. Get away from here, you always bother me. Get away.'"

The defendant then called Dr. Katherine Beardsley as a witness who testified she was a clinical psychologist at St. Elizabeths Hospital (T. 251); that she examined defendant four times in March, 1962; that she "administered the Wechsler Scale, the Bender Gestalt, the Behn Rorschach, the Thematic Apperception Test; the house-tree-person; and the Szondi" (T. 254); that a history was available to her at the time the tests were made; that her "opinion, on the basis of my tests, the test results were consistent with a diagnosis of chronic undifferentiated schizophrenia" (T. 255); that this is a psychosis and a mental disease; that defendant had this condition in June, 1961 and September, 1961 (T. 257); that but for his mental disease at the times the offenses alleged in the indictment would not have occurred (T. 257); that she made the test results available to psychiatrists at St. Elizabeths Hospital (T. 259); that it is part of the diagnostic process for

psychiatrists; that the manual of mental disorders published by the American Psychiatric Association classifies defendant's mental disease as a psychosis (T. 260).

The defendant then called Dr. Mauris M. Platkin as a witness (T. 295) who testified he is a psychiatrist at St. Elizabeths Hospital and that a history of the defendant was taken in the hospital under the Doctor's supervision and was available to Platkin (T. 296); that he examined defendant on a number of occasions between January 8, 1962 and April 9, 1962 (T. 296); that in June, 1961 and September, 1961 the defendant was suffering from "a schizophrenic reaction, chronic undifferentiated type; that this is a psychosis and a mental disease" (T. 300); that this diagnosis was arrived at by the Doctor as follows:

> "In view of the history as presented, the collateral information for which we wrote from any sources, the interviews with various people, that is, members of his family, interviews with the patient, psychological examination, my own observations, reports from the ward as to his behavior, in view of all of these examinations and observations, it was my opinion that he was suffering from a schizophrenic reaction, chronic undifferentiated type."

The witness further testified that the foregoing is a mental disease and a psychosis; that defendant was suffering from this mental disease in June and September, 1961 (T. 301). This witness then explained the dynamics of said disease to the Court and jury and how the defendant was so affected (T. 301-305); that in the Doctor's opinion the acts alleged against defendant were the product of the defendant's mental disease (T. 304); that the defendant is now suffering from this mental disease (T. 307); that but for his mental disease the defendant would not have committed any of the acts alleged (T. 342); that the Diagnostic and Statistical Manual of Mental Disorders of the American Psychiatric Association is the manual "by which all

hospitals and most private physicians use in establishing diagnosis", and defendant's type of mental illness is listed therein (T. 344).

The defendant then called Dr. William Novak as a witness who testified that he was "clinical director of the depart of psychiatry at the District General Hospital" (T. 346); that he examined defendant in October, 1961 in accordance with his official duties; he testified as to defendant's history; that he examined defendant approximately eight times (T. 349); that based on defendant's "history and my work with him as well as the observations of my colleagues and the conferences among us, we felt that he seemed to be having periodic psychotic episodes at that time" (T. 350); that in June and September, 1961 the defendant was suffering from "schizophrenic reaction of the undifferentiated type", and this is a mental disease (T. 350); that the acts allegedly committed by defendant were products of his mental disease (T. 352).

The defendant then called Dr. John L. Endacott as a witness who testified he was the Assistant Chief Psychologist in the Mental Hygiene Clinic in the Veterans Administration (T. 376); that prior to such employment he had many years of experience as clinical psychologist in institutions named by him, and had been a practicing psychologist for twenty-five years (T. 377); that he examined defendant and gave him tests on four different occasions, November 5, November 19 and December 3, 1961 at the D. C. General Hospital, and on March 3, 1962 at St. Elizabeths Hospital (T. 378); that such tests were Wechsler-Bellevue Adult Intelligence Scale, the Graham-Kendall Test for Organic Brain Damage, the Rorschach Test, and the Sumonds Picture Story Test (T. 378); that the tests indicated the defendant was suffering from schizophrenia, undifferentiated type (T. 379); that this is a mental disease; that the acts charged, if committed by defendant, were directly the result of the schizophrenic condition, and but for this schizophrenia the defendant would not have committed the acts (T. 380). There followed 33 pages of cross-

examination regarding the tests and the manner of giving them.

The defendant then called Dr. John V. Kavanagh as a witness who testified that he was employed by the Department of Health, Education and Welfare and that he had specialized training as a Psychiatric Social Worker; that he was formerly employed in such capacity with the United States Army and the Veterans Administration (T. 437); that he interviewed the defendant three times in the spring of 1961 at the request of Father Davis, the principal of Mackin High School because:

> "Father Davis felt that the boy was not producing the work that he should have. Teachers in classrooms were becoming alarmed because he was not paying as strict attention to the class as he might. He was laughing inappropriately at times and he just wasn't showing vitality that a boy as young and healthy as he seemed to be, should have shown."

The witness further testified that based upon his experience in the field of psychiatric social work, he felt there was something wrong with defendant, and that the defendant needed psychiatric help (T. 439).

The defendant then called Dr. Malcolm Meltzer as a witness who testified he was employed as a clinical psychologist by the Veterans Administration and by Duke University (T. 443); that he was formerly a research scientist at Georgetown University Medical Center and clinical psychologist at D.C. General Hospital; that he gave tests to the defendant on October 25, October 26, and December 4, 1961 at D.C. General Hospital as part of his official staff duties there (T. 445); that based on such tests, his opinion was that in June and September, 1961 the defendant was suffering from a schizophrenic reaction, "and that during the period such as the one described there would be times of psychosis, unrealistic thinking, poor judgment, loose associations, poor impulses control and unrealistic picture of the world" (T. 446); that it was highly

likely the defendant was suffering from a mental disease; that if the defendant committed the acts charged, it is highly likely they were caused by his mental disease (T. 447); that but for such mental disease, the defendant would not have committed such alleged acts; that he gave the defendant the Wechsler Test, the Rorschach test, the Human figure drawing test, the Thermatic Apperception Test, the Portens maze test and the Kohn test; and then there followed 20 pages of cross-examination of the manner of giving the test.

The defendant then called Dr. Dorothy S. Dobbs, staff psychiatrist, St. Elizabeths Hospital, as a witness who testified she was assigned to the maximum security division in that hospital (T. 472); that in the course of her official duties, she examined the defendant on 3 or 4 occasions other than the staff conferences between January 8, 1962 and April 9, 1962 (T. 473); that she had available a psychiatric social history of defendant, part of which she took (T. 473); that based upon the history and examinations, she was of the opinion the defendant in June and September, 1961 "was suffering from schizophrenia reaction, chronic undifferentiated, which, of course, is a mental disease" (T. 474); that this is a psychosis. She then testified to the psychodynamics of Kent's mental disease (T. 474-476); that if the acts charged were committed by defendant, they were products of his mental disease (T. 476); that on the basis of the history and findings, the defendant's mental illness in June and September 1961 was severe (T. 477). There followed many pages of cross-examination by the prosecutor, which like his cross-examination of other defense witnesses, did not change the effect of the testimony. However, it must here be noted that there was absolutely no basis in the record for the prosecutor's hypothetical questions to this witness (T. 491) based on the alleged assumption that the intruder had already taken Palmer's money "before he touched her" (T. 491, 497), and also the hypothetical question asked of this witness (T. 500-501) based on the asumption that the intruder took the

wallet in the Murphy home prior to having sexual relations with her.

The defendant then called Dr. Warren C. Johnson as a witness who testified he was a psychiatrist in private practice, a diplomate of the Board of Psychiatrists and a member of many named psychiatric organizations (T. 316); that he examined the defendant three times in 1961 in the jail and D.C. General Hospital; that he took a history from defendant and also had other clinical histories available to him (T. 518); he explained the dynamics of his examination of defendant (T. 519-521); that his opinion of defendant's mental condition in June and September 1961 was "that this person at that time was suffering from schizophrenia and that he has had a schizophrenic picture for some time and still continues to demonstrate examples of a mental disorder which we call schizophrenia; that when he examined defendant again in St. Elizabeth's Hospital on February 2, 1962 he was "more and more in the paranoid type of schizophrenic" and had been placed in "a disturbed ward" (T. 523); he then explained the dynamics of the new symptoms of defendant (T. 524-526); that if the defendant committed the crimes charged, they were the products of his mental disease (T. 528); on cross-examination this witness gave the dynamics of the defendant's mental disease (T. 549-554).

The defendant then called Dr. Bernard Levy as a witness who testified he was director of psychological services for the D.C. General Hospital (T. 560) and during the past five years he had given patients "between a thousand and two thousand psychological tests; that on September 9, 1961 he gave defendant the Rorschach test at the Receiving Home; that on the basis of this test the defendant in June and September, 1961 was suffering from "a psychotic condition, Schizophrenia, to be more exact, type, undetermined (T. 563); that if the defendant committed the crimes charged, they were the product of his mental illness, and the alleged crimes were directly related and proximately caused by the mental illness (T. 563); the witness then

gave the dynamics of the defendant's test (T. 563-564); and on cross-examination (T. 568-597).

The Court then read to the jury the following stipulation agreed to by the Government and defendant (T. 600-602):

> "The Court: Ladies and gentlemen of the jury the attorneys for the Government and for the defendant have agreed upon a stipulation about certain evidence which I am going to bring to your attention at this time.
>
> This stipulation constitutes evidence in the case and evidence for your consideration, just as if the witnesses named in the stipulation, took the witness stand and were examined and cross-examined.
>
> The stipulation is as follows: If Doctor William Hamman and Dr. James A. Ryan were called as witnesses in this case they would be recognized by the Court as experts in the field of psychiatry, as both individuals are medical doctors, specializing in the field of psychiatry.
>
> It is stipulated that Dr. Hamman would testify that he is the staff psychiatrist at St. Elizabeths Hospital, and that Dr. James A. Ryan is a staff psychiatrist at the District of Columbia General Hospital. It is stipulated between the defendant and the Government that both witnesses would testify that they had given psychiatric examinations to the defendant in the fall of 1961, and had available to them at the time of these examinations, pertinent history concerning the defendant.
>
> Both witnesses would testify that on the basis of their individual psychiatric examinations, they were of the expert opinion, to a reasonable medical certainty, that the defendant, Morris Allen Kent, Jr. was suffering from a mental disease, that is, schizophrenia of an undifferentiated type; a mental disease and considered in the classification of a psychosis.
>
> Both would testify as to their expert opinion to a reasonable medical certainty, that all of the crimes of

rape, robbery, and housebreaking if committed by the defendant, at the times and places as set forth in the indictment, were the direct product of the mental disease, that is, schizophrenia, undifferentiated type, and in their opinion, but for the presence in the defendant of this mental disease at the times and places set forth in the indictment, the defendant would not have committed the acts.

Both would testify in their expert opinion to a reasonable medical certainty that the defendant's volitional controls were substantially reduced during the times and places as set forth in the indictment, directly because of this mental disease."

The defendant then called Cornelia Dawson as a witness (T. 602) who testified she is an aunt of defendant and has known defendant all his life; that defendant was alway extremely nervous and the least little thing would upset him and make him cry; "quite distant"; that "when we would go around to visit him he would often go to his bedroom or go out in the street, or go to the basement. And he had very little to say . . . He just seemed to not want to be bothered" (T. 604); that defendant was a very poor sleeper and no control of his bowels, and would put "the excretion . . . all over his body, his neck, and his face" (T. 605); that defendant was extremely afraid of his father.

The defendant then called Mrs. Thomas Cope as a witness who testified she was defendant's aunt (T. 608) and she had known him all his life; that she lived in same house with defendant for 10 years and saw him often (T. 608); that "I noticed Morris' span of attention was very, very short. And also I noticed if the door bell rang Morris wouldn't answer it and as a matter of fact, he would say he never heard it. And if the phone would ring that didn't bother him, he didn't hear it. And when children would come around, for instance my grandchildren and other children, Morris would withdraw himself from everyone and would go in a room perhaps and darken the room and sit

alone and look in space" and in his sleep "he used to grit his teeth an awful lot at night. He talked all during his rest, and many times he would fall out of bed" (T. 608-609) that defendant had no control of his bowels whatsoever (T. 609); that defendant feared his father and would run and hide from him; that when defendant was about thirteen, she talked to the Juvenile Court authorities about his conduct and to them "I mentioned Morris' actions and I felt that Morris needed help, and it seemed to be growing worse, and I asked him while they had him there if they would give him psychiatric care, because I was most concerned about him, because he was getting worse" (T. 612); that she saw a further change in defendant's personality when he was between 13 and 16, and "Well, when he was between those times, of course, his chores, we would give him more, and he would start on something and then he would be engaged in a long conversation with someone. You would think the room was full of people. And many times I would call him and he wouldn't answer. And I would go to him and tap him on his shoulder, and I would say, Morris, and it didn't dawn on him that he hadn't finished the job. He would only do part of it, just like a child five years old. And he would think the job was well done. And he was always wanting to do something" (T. 613).

The Court then admitted in evidence a document entitled "Social Study" which is a Juvenile Court record dated 3-17, 1959, and which purports to be a social study of defendant at that time (T. 622-627), and a portion of a Juvenile Court probation report dated September 8, 1961 (T. 627); the second report states in part: "The marked duality in his pattern of adjustment suggests the rapid deterioration of his personality structure and the possibility of mental illness" (T. 628).

The defendant then called Dr. Charles E. Goshen, as a witness who testified he was Associate Professor in the Department of Psychiatry, West Virginia University School of Medicine (T. 633); that he was certified as a diplomate

by the American Board of Psychiatry and Neurology in 1948; that he examined defendant on September 16, and September 29, 1961 and in December, 1961 (T. 634); that he concluded defendent was suffering from schizophrenia, chronic undifferentiated type (T. 635); the witness then gave the dynamics of the defendant's mental illness (T. 635-642); that the crimes charged, if committed by defendant, were products of his mental disease in June and September 1961 (T. 642); the witness maintained his position on cross-examination (T. 650-658) even though the prosecutor's hypothetical question was not based on the evidence (T. 654).

The defendant then rested his case.

The prosecution then called Dr. David J. Owens as a witness in rebuttal who testified (T. 669) that he was clinical director of the maximum security unit at St. Elizabeths Hospital; that he was present at the medical staff conference in this case on April 4, 1962 (T. 671); that after he interviewed defendant and at the diagnostic staff conference he was of the opinion that defendant was suffering from a mental disease on June 5, June 12, and September 2, 1961, "schizophrenic reaction, chronic undifferentiated type" (T. 672), in his attempts to rebut "productivity", the prosecutor asked this witness a hypothetical question on the Echols counts that was not based upon admitted facts or upon facts disclosed in the record (T. 659); that the witness answered this improper hypothetical question by stating "assuming the information that you gave me, I would say that schizophrenia was not—did not cause the robbery itself". (T. 674); Q. "and how about the housebreaking? A. Probably not—I would have no opinion about the housebreaking. Q. Did, in your opinion, the chronic schizophrenia that you diagnosed cause this defendant to rape this woman? A. I would have no opinion on that" (T. 674); in his attempt to rebut "productivity" on the Palmer robbery count, the prosecutor then asked this witness a hypothetical question that was not based upon admitted facts or upon facts disclosed in the record (T. 674-

675) (especially when he asked the Doctor to assume "that he thereafter came in the apartment and he first took a wallet, a woman's purse, containing a certain amount of Gloria Palmer's money; and that after he had taken that wallet, Miss Palmer was awakened with hands over her mouth . . ."); the Doctor then answered this improper question whether the alleged robbery was caused by this disease by stating "Probably not" (T. 675); in his attempt to rebut "productivity" on the Murphy robbery count, the prosecutor then asked this witness a hypothetical question that was not based upon admitted facts or upon facts disclosed in the record (T. 675) (especially when he asked the Doctor to assume that "he went in there and took this lady's money first"); the Doctor then answered this improper question as to whether the Murphy robbery was caused by defendant's disease by stating "The robbery was probably not, assuming the information that you gave me" (T. 676). This witness then gave the dynamics of defendant's mental disease (T. 677-678), during which the following occurred:

> Q. Now doctor, will you explain to His Honor and these ladies and gentlemen of the jury, your reasons as a pyschiatrist for the opinions you have heretofore given, namely, that you saw lack of causation between your diagnosis of the disease and the robberies and your lack of ability to form an opinion as to whether or not there was a causation in regard to the three housebreakings and the two rapes?
>
> A. Well, in my opinion this patient is suffering from schizophrenia. He has a mental illness. Now as to the symptoms that were present, there were a number of symptoms of the schizophrenia that were present.
>
> Do you want me to elaborate on these or just on the causality? The difficulty that I had there?
>
> Q. No, sir. I want you to inform His Honor and the jury as fully as you can on the symptomatology and on the lack of causation and your lack of ability to

form an opinion on the causation on the rapes and the housebreakings?

A. The symptoms that were present which is one of the cardinal symptoms of schizophrenia, was the thought disturbance and the affect of the emotional disturbance, and the splitting between the two. This is where the term schizophrenia comes from.

There is a symptom that his thinking was not consistent or it did not follow the emotions of the individual. This is probably the most significant symptom of schizophrenia. The inability to probably arrive at an opinion as to productivity in this particular case is mainly based on the fact that in his symptoms there was considerable sexual preoccupation, that is difficulty with sexual thoughts, sexual ideas, and he had extreme difficulty understanding some of his sexual feelings.

Now if primary motivation for committing a crime would happen to be the sexual desires, which were involved with his illness, then this would be productivity. If the primary motivation were robbery or to get something to eat, then this would not be connected with the sexual preoccupation which was in turn a symptom of his illness.

This is the reason that I have difficulty in arriving at a firm opinion as to the productivity.

Q. Now doctor in the assumed three situations that I have given you in regard to the Echols woman, who was practically nude, and in the Gloria Jean Palmer woman, and in the Mary Murphy woman, Murphy being raped under the assumed statement of facts, does the assumed statement of facts, the fact that the robbery took place first in point of time, before the sexual acts of the two, have any significance to you as a psychiatrist?

A. Well assuming that this was the primary motivation, that he went there for to rob, that is to rob someone, this is his first interest when he got there, then this would be quite significant, meaning that he entered the building for this purpose.

On the other hand, if assuming that he did not go for this and he should have gone primarily for the sexual reasons then this would be different.

Q. If doctor, under the assumed statement of facts that I have given you in regard to the Echols lady, who was practically nude, and who was raped, and the Murphy lady, who was raped, and the Palmer woman, who was touched on the mouth, if the primary motivation in this defendant's mind for going into those three apartments, had been sexual, in other words, to attack women? In your opinion as a psychiatrist, would he have attack the women first and then taken the money, as he didn't do or would he have taken the money and then attack the women as he did do under the assumed statement of facts?

Mr. Sandground: Your Honor, I object to that question. It goes into the assumption as the primary motivation of which there is no evidence, and which the witness has said he could only speculate about. This is a hypothetical question with an assumption which is not tied in with the evidence as the primary motivation. I think it is improper.

The Court: The Court will overrule the objection. Answer the question, doctor.

A. I would say his primary motivation was robbery.

Q. Will you explain why on the basis of your last answer to my rather lengthy question that preceded it?

A. Because this is the first thing that he did. It is very simple and I can answer this is what he did first. This is assuming that this is correct, his motivation was accomplished by his first act when he entered.

On cross-examination, the Doctor testified that at the St. Elizabeths staff conference, there was unanimity of opinion that the defendant was suffering from a mental disease at the time of the commission of the crimes, that is "schizophrenic reaction, chronic undifferentiated type" (T. 681);

that this disease is considered a psychosis (T. 682); that on the basis of his examinations of defendant, he had no opinion as the causal connection between the crimes and the defendant's mental disease (T. 682-683); that the reasons for his possible change of opinion as to the causal connection between the robberies and the mental disease was answered by the Doctor as follows:

> A. I don't think it is so much a change of opinion. I think my opinion is still that I don't have a firm opinion one way or the other. However, assuming the information that Mr. Lowther gave me concerning the alleged criminal offenses, assuming that it was correct, then he the patient, I have some additional information which I was not familiar with at the time of the medical staff conference. I did not have this information from the patient. I did not have it from other sources.
>
> And I am only assuming that this is correct. If this is correct then his motivation for going to the apartments was—it could have been robbery or it could have been for sexual purposes or it is possible that it could have been for both (T. 683).
>
> Q. When you stated that in your opinion the prime motivation of the defendant on entering the apartment was for robbery, isn't this merely a speculation on your part as to the question as to what was the prime motivation and as to what was a secondary motivation?
>
> A. Well, my opinion is based on the assumed facts—now if the assumptions that I was given, if these were not correct, then certainly my opinion would be changed (T. 685).

that the witness does not know what was the prime motivation of defendant in allegedly entering any of the apartments (T. 685-686).

On redirect examination, over the objection of defendant, the prosecutor again asked the improper hypothetical questions of this witness that were not based upon

admitted facts or facts disclosed in the record ("robbery first") (T. 687-688); the Doctor then answered these improper questions as to whether the alleged robberies were caused by the defendant's mental disease by stating: "I would say that from the information that you have just given, if this is correct, then I cannot see a connection between a robbery and his illness" (T. 688).

The prosecution then called Dr. John R. Kavanagh as a witness in rebuttal (T. 689) who testified that he examined the defendant four times at the request of the United States Attorney's office (T. 690); that he decided defendant did not have a mental disease on the dates of the offenses alleged in the indictment (T. 690); that his opinion "was based on all of these examinations and depended, of course, in large measure on what he said to me" (T. 691); he then testified as to the basis for his psychiatric opinion, most of which repeat the defendant's conversations with the witness had during such examinations (T. 691-692); this witness did state the defendant was suffering from "form of sexual perversion and transvestism" (T. 700); that defendant had a nervous manifestation, "sometimes referred to as an irritable colon or spastic colon" (T. 701); the Doctor then concluded his testimony on direct examination by stating:

> Now these represent a summary of our findings. I have tried to present them to you in a way which offers to you those things which might be considered to be of a psychotic nature and indicate unsoundness of mind, such as the voices. But on the whole, I think that the history that I present here is one including the voices, which I think are quite understandable in an individual who has these tendencies. And by tendencies I mean the schizoid tendencies that he has. That they do not represent a picture which I could consider that of an individual who has an unsoundness of mind, or, in my own terms who is psychotic (T. 702).

On cross-examination, this witness testified "I hope I haven't given that impression" that defendant is a normal individual (T. 704); that defendant has a "schizoid personality" (T. 705); that in his opinion a personality disorder in which the schizoid personality would be included does not represent a disease in either the terminology used by the Court or the terminology used by psychiatrists (T. 706); that the defendant's withdrawal during the examinations of him by the witness "was one of the manifestations of the symptoms of schizophrenia" (T. 708) that some things done by defendant constitute a form of sexual perversion, and according to the classification given by the witness "it would come in the classification of sociopathic personality disturbances in which sexual perversion is a sub-variety. *So it is my opinion it would be evidence of a personality disorder rather than a disease*" (T. 710) (Emphasis supplied); that he is familiar with the Diagnostic and Statistical Manual of Mental Disorders of the American Psychiatric Association and personality disorder was a valid classification of mental diseases and disorders when listed in said Manual (T. 710); that other conduct exhibited by defendant is also evidence of a personality disorder (T. 711); *that he would define the mental condition that he found in defendant as being that of a schizoid personality* (Emphasis supplied) (T. 716); the Doctor further testified "It is my feeling that in my examination, I did not find anything more than a schizoid personality and granted perhaps a schizoid personality may go ahead and become schizophrenic, I found no evidence of schizophrenia" (T. 718); that he would classify the schizoid personality as a personality disorder (T. 719); that it is so classified in the Statistical Manual (T. 720); that he had the aid of psychological tests given by Dr. Bernard Levy when he reached his diagnosis of defendant; that these tests indicated that the defendant was suffering from schizophrenia, undifferentiated type (T. 725).

The prosecutor then told the Court that "a man named Diamedes Puilos (not called as a witness) who lived in

apartment 507 in the Echols building and who, when interviewed, said that he was awake until the police arrived and he heard no screams (T. 727).

Both sides then rested their cases.

The defendant then again moved for a judgment of acquittal and the motion was denied by the Court (T. 730).

APPENDIX B

The revisions of the Juvenile Court Act, in no way affecting the instant case, are listed below from D.C. Code (1963):

§ 11-1551.

(a) Except as herein otherwise provided, the Juvenile Court has original and exclusive jurisdiction of all cases and in proceedings:

(1) concerning a child as defined by section 16-2301:

(A) who has violated a law, or has violated an ordinance or regulation of the District of Columbia;

(B) who is habitually beyond the control of his parent, guardian, or custodian;

(C) who is habitually truant from school or home;

(D) who habitually so deports himself as to injure or endanger himself or the morals or safety of himself or others;

(E) who is abandoned by his parent, guardian, or custodian;

(F) who is homeless or without adequate parental support or care, or whose parents, guardian, or custodian neglects or refuses to provide support and care necessary for his health or welfare;

(G) whose parent, guardian, or custodian neglects or refuses to provide or avail himself of the special care made necessary by his mental condition;

(H) who associates with vagrants, or vicious or immoral persons;

(I) who engages in an occupation, or is in a situation, dangerous to life or limb or injurious to the health or morals of himself or others;

(2) subject to applicable statutes of limitation, concerning a minor 18 years of age or older who is charged with:

(A) having violated any law; or

(B) having violated any ordinance or regulation of the District of Columbia . . .

§ 11-1553. Waiver of jurisdiction in case of felony and transfer of case.

When a child 16 years of age or over is charged with an offense which if committed by a person 18 years of age or over is a felony, or *when a child under 18 years of age is charged with an offense which if committed by a person 18 years of age or over is punishable by death or life imprisonment, a judge may, after full investigation,* waive jurisdiction and order the child held for trial under the regular procedure of the court which would have jurisdiction of the offense if committed by a person 18 years of age or over; *or the other court may exercise the powers conferred upon the Juvenile Court by this chapter* and subchapter I of chapter 23 of Title 16 in conducting and disposing of such cases. (Dec. 23, 1963, 77 Stat. 499, Pub. L. 88-241, § 1). (Emphasis supplied.)

§ 11-1586

(b) The records or parts thereof made by officers of the court pursuant to sections 11-1525 and 16-2302, referred to in subsection (a) of this section as social records, shall be withheld from indiscriminate public inspection, except that they shall be made available by rule or special order of court to such persons, govern-

mental and private agencies, and institutions as have a legitimate interest in the protection, welfare, treatment, and rehabilitation of the child under 18 years of age, and to any court before which the child may appear. The court may also provide by rule or a judge may provide by special order that any such person or agency may make or receive copies of the records or parts thereof. Persons, agencies, or institutions receiving records or information pursuant to this subsection may not publish or use them for any purpose other than that for which they were received.

(c) Whoever, except for the purposes permitted and in the manner provided by subsections (a) and (b) of this section, discloses, receives, or makes use of, or authorizes, knowingly permits, participates in, or acquiesces in, the use of information concerning a juvenile before the court, directly or indirectly derived from the records, papers, files, or communications of the court, or acquired in the course of official duties, upon conviction thereof, shall be guilty of a misdemeanor, and shall be fined not more than $100 or imprisoned not more than ninety days, or both.

(d) Prosecutions pursuant to subsection (c) of this section shall be brought in the name of the District of Columbia in the District of Columbia Court of General Sessions by the Corporation Counsel or any of his assistants. As used in this subsection, "Corporation Counsel" has the same meaning as that prescribed by section 11-1583(b).

(e) Except on order of the court, the records or proceedings in a case arising under subchapter II of chapter *23 of Title 16 may not be open to inspection by anyone other than the defendant or counsel of record.* The court, upon proper showing, may authorize the clerk to furnish certified copies of the records or portions thereof to the defendant, the mother, or custo-

dian of the child, a party in interest, or their duly authorized attorneys. The clerk may furnish certified copies of the records or portions thereof, upon request, to the United States attorney for the District of Columbia for use as evidence in nonsupport proceedings as provided by sections 11-523, 11-1556, 16-2355, and 16-2381 and to the Director of Public Health as provided by section 16-2354(a). (Dec. 23, 1963, 77 Stat. 501, Pub. L. 88-241, § 1). (Emphasis supplied.)

§ 16-2306

(a) When an officer takes a child into custody, he shall, unless it is impracticable or has been otherwise ordered by the court, accept the written promise of the parent, guardian, or custodian to bring the child to the court at the time fixed. Thereupon, the child may be released in the custody of a parent, guardian, or custodian. If not so released, the child shall be placed in the custody of a probation officer or other person designated by the court, or taken immediately to the court or to a place of detention provided by the Board of Commissioners of the District of Columbia or its authorized representative, and the officer taking him shall immediately notify the court and shall file a petition when directed to do so by the court.

(b) A child whose custody has been assumed by the court may, pending final disposition of the case, be released by the court in the custody of a parent, guardian, or custodian, or of a probation officer or other person appointed by the court, to be brought before the court at the time designated. When not released as herein provided, the child, pending the hearing of the case, shall be detained in a place of detention provided by the Board of Commissioners of the District of Columbia or its authorized representative, subject to further order of the court.

(c) This subchapter does not forbid a peace officer, police officer, or probation officer from immediately taking into custody a child:

(1) who is found violating a law or ordinance; or

(2) who is reasonably believed to be a fugitive from his parents or from justice; or

(3) whose surroundings are such as to endanger his health, morals, or safety, unless immediate action is taken.

In a case specified by this subsection, the officer taking the child into custody shall immediately report the fact to the court and the case shall then be proceeded with as provided by this subchapter and chapter 15 of Title 11. A child so taken into custody may not be held in a place of detention for a period longer than five days, excluding Sundays and holidays, unless the court orders him detained for a further period. (Dec. 23, 1963, 77 Stat. 588, Pub. L. 88-241, § 1).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 104

MORRIS A. KENT, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR AMICUS CURIAE

The sponsors of this brief are: Honorable Thurman Arnold, Garry Bellow, Esq., Elyce Zenoff Ferster, Esq., Steven P. Frankino, Esq., Robert Edward Goostree, Esq., Rufus King, Esq., Nicholas N. Kittrie, Esq., Dr. Verl Lewis, Vernon X. Miller, Esq., Sol Rubin, Esq., James E. Starrs, Esq., B. J. Tennery, Esq., and Arnold Trebach, Esq.

The sponsors of this brief do not speak for any organization. Their position is motivated however by an increasing public concern for the treatment of juvenile of-

fenders consistent with fundamental fairness and is further founded on a personal conviction that the legal foundation of juvenile court proceedings, as well as juvenile court accomplishments and record to date, require a careful review in light of our constitutional law precepts. The sponsors, especially because they support the juvenile court institution, believe that such review of proceedings and standards will aid, rather than weaken, the role of the juvenile court.

I. INTRODUCTION — The Significance of This Case

The importance of this case rests on the fact that it contains significant issues of Federal constitutional law about which there are many diverse opinions and holdings within the American judicial establishment. The central question posed is to what extent traditional constitutional guarantees apply to juvenile court proceedings.[1]

There are many issues involved in this case, but this brief does not discuss all of them, as does the main brief. This amicus brief has a limited objective: (1) *to urge the Court to decide that the grant of discretionary power to the juvenile courts to waive jurisdiction, when unaccompanied by reasonable and ascertainable standards, is contrary to the due process and equal protection requirements of the Fifth Amendment,* and (2) *to urge the Court to decide that the Sixth Amendment counsel guarantee applies to juvenile court and that there is a right to a hearing and counsel under the Fifth and Sixth Amendments in juvenile court proceedings where waiver is contemplated.*

The establishment of the juvenile courts was hailed by Dean Roscoe Pound as "one of the most significant ad-

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[1] This Court has never ruled on the question as to whether there is a right to counsel in juvenile court proceedings. While this case arose within a federal jurisdiction, the District of Columbia, it could have implications for state proceedings since this Court has given national application to the essential ingredients of the right to counsel guarantee in Gideon v. Wainwright, 372 U.S. 335 (1963).

vances in the administration of justice since the Magna Carta." Brought into the American judicial framework some fifty-five years ago, juvenile courts now exist and operate in every state.[2] It is estimated that more than one million cases pertaining to delinquent or neglected children are brought before these courts each year.[3]

It should also be noted preliminarily, for an appreciation of the significance of procedural matters in juvenile courts, that out of the more than three thousand juvenile court judges, one-fifth are not lawyers and more than half devote less than one-fourth of their time to juvenile and family matters.[4]

The Juvenile Court has been described as an "'informal' court, a 'private' court and a 'therapeutic' court. That is to say, the procedures of the court are marked by informality and something of the 'conference' as opposed to 'trial' atmosphere; its business is regarded as a confidential matter. . . ."[5] Since the view was prevalent, from the inception of juvenile courts, that juvenile proceedings are not criminal, it was thought unnecessary to apply to them the same substantive and procedural standards required in adult criminal proceedings.[6] Thus,

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[2] Tappan, Juvenile Delinquency, pp. 172-173 (1949); Skoler, *Juvenile Courts and Young Lawyers*, 10 The Student Lawyer J. 5 (1964).

[3] Juvenile Court Statistics - 1962, U.S. Children's Bureau Statistical Series No. 73 (1963).

[4] Biographical Data Survey of Juvenile Court Judges, George Washington University Center for Behavioral Sciences (monograph, 1964) at 10, 21.

[5] Skoler, note 1, at 5, 6.

[6] Sussman, Juvenile Delinquency, pp. 11-16 (1955); *Standard Juvenile Court Act*, Sec. 1 (1959). For a more detailed account of recent juvenile court standards in such areas as hearing, evidence and right to counsel see Paulsen, *Fairness to the Juvenile Offender*, 41 Minn. L.R. 547 (1957).

it is not clear if the right to a formal hearing and to counsel applies in juvenile court proceedings in American courts.

The unsettled state of the law as to the right to counsel in juvenile court is reflected by a quotation from a District of Columbia decision: "There is no unanimity of opinion among the various courts as to whether or not constitutional guarantees are applicable to juvenile offenders. The position is best stated in an annotation at 151 A.L.R. 1229: 'Such suggestions as may be gathered from cases discussing the general question of constitutional guarantees as applicable to juvenile offenders . . . in juvenile court proceedings, indicate unsettled and conflicting views,' and further the opinions of some courts 'respecting the constitutional issues presented, or which may, upon proper presentment, become directly involved, illustrates the existence of a sharp divergence of views as to the applicability of constitutional limitations to juvenile courts.'" *In re Poff.*[7]

The juvenile court standards in the District of Columbia, likewise, are not well defined. In the *Poff* case[8] the District Court held in 1955 that the Sixth Amendment counsel guarantee applied to a juvenile court proceeding in the District of Columbia. The following year, the United States Court of Appeals for the District of Columbia Circuit held in the *Shioutakon* case[9] that the D.C. Code required, by implication, the application of the right to counsel in juvenile court cases. The court did not see fit to "reach" the constitutional issues, but chose instead to dispose of the case purely on the basis of statutory interpretation.[10] The D.C. courts, furthermore, have not rec-

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[7] 135 F.Supp. 224, 226 (1955).

[8] 135 F.Supp. 224 (1955).

[9] Shioutakon v. District of Columbia, 236 F.2d 666 (1956).

[10] *Id.* at 669, n. 18.

ognized the right of a child, considered for waiver into district court, to a hearing of any kind preliminary to such waiver, as witness this case.[11]

Still, despite the unsettled status of juvenile courts, there has continued to be an awareness and recognition that the due process concept should place "some" constitutional limitations on how juvenile courts dispose of their business.[12] Indeed, the definition of these limitations has become of increasing interest and concern in recent years.[13] In part, this concern has been the product of a questioning attitude towards the true contents and effect of juvenile proceedings.

Referring to juvenile court proceedings as not criminal and therapeutic does not automatically resolve the question of constitutional guarantees, as long as a determination of delinquency carries with it a degree of social condemnation and deprivation of liberty. The United States Court of Appeals for the District of Columbia Circuit in a 1956 decision quoted a report on the functioning of the District's juvenile courts, pointing out that "the atmosphere of formality which surrounds the hearings [in the District] is equal to or greater than that in hearings in adult courts."[14] And the United States District Court for the District of Columbia has referred to a California decision which declared, "While the juvenile court law

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[11] See United States v. Stevenson, 170 F. Supp. 315 (1959), and Wilhite v. United States, 281 F.2d 642 (1960).

[12] Skoler, note 1, at 6. Rubin, *Protecting the Child in the Juvenile Court*, 43 J. Crim. L. and Crim. 425 (1952).

[13] Paulsen, *Fairness to the Juvenile Offender*, 41 Minn. L. Rev. 547 (1957); Antieau, *Constitutional Rights in Juvenile Courts*, 46 Cornell L.Q. 387 (1961); Beemsterboer, *The Juvenile Court - Benevolence in the Star Chamber*, 50 J. Crim. L. & Crimin. 464 (1960).

[14] Shioutakon v. District of Columbia, *supra*, note 8, at 668, n. 10.

provides that adjudication of a minor to be a ward of the court shall not be deemed to be a conviction of a crime, nevertheless, for all practical purposes this is a legal fiction, presenting a challenge to credulity and doing violence to reason."[15]

The present case not only provides an opportunity for the necessary definition of constitutional standards in juvenile court but indeed demands it.

II. THE FACTS OF THE CASE

Petitioner Morris A. Kent, Jr., was a child aged sixteen at the time of his arrest in the instant case. He had previously been a probationer of the juvenile court and subject to its care for two years. He was arrested, in connection with the instant case, at about 3:00 p.m. on September 5, 1961. He was taken to police headquarters, instead of the juvenile court or the Receiving Home for Children, as required by law, and was kept there until 10:00 p.m. He was fingerprinted and interrogated by police officers acting in relays. He was again unremittingly interrogated by police officers the following day. On September 6, 1961, his mother retained counsel. Counsel filed an objection to the treatment of the child with the Juvenile Court and a motion requesting that Petitioner's Social Service file be made available to him in order that it could be evaluated and effective assistance of counsel be rendered. Counsel further moved the Juvenile Court for a hearing at which he could present his case against waiver of jurisdiction of the child to the adult court on capital charges. The Juvenile Court failed to pass upon the objection and motions. Furthermore, counsel was never afforded, during any part of the proceedings, either a formal or informal appearance before the court.

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[15] *In re* Poff, 135 F. Supp. 224, 226 (1955), quoting *In re* Contreras, 241 P.2d 631, 633 (1952).

On September 12, 1961, the Juvenile Court entered an order, without any opinion or statement of reasons, waiving the Court's jurisdiction over petitioner and ordering that he be held for criminal trial under the regular procedures by the United States District Court for the District of Columbia. This order was in pursuance of Title 11-914, D.C. Code and Policy Memorandum 7 of the Juvenile Court (issued November 30, 1959) which includes the criteria for such waivers.

Upon petitioner's trial in District Court, the confessions obtained from the child by the means described, though excluded from evidence, were the basis of hypothetical questions addressed to expert witnesses in rebuttal of petitioner's insanity defense. Likewise, fingerprints, secured under juvenile court auspices, were utilized to prove guilt in the district court.

III. THE ISSUES OF THE CASE

We believe that this case urgently presents the following questions:

1. Is Title 11-914, D.C. Code, which provides that the Juvenile Court have discretion in determining waiver of its jurisdiction over children of sixteen and older, without establishing any applicable standards, and without affording a hearing, unconstitutional because it permits arbitrary and unreasonable classifications contrary to the equal protection requirements of the Fifth Amendment to the Constitution of the United States and because it is a denial of due process guaranteed by the Fifth Amendment?

2. Is a child over sixteen denied his constitutional protection under the Fifth and Sixth Amendments when the Juvenile Court waives its jurisdiction and makes him accountable under the adult criminal law, without affording such child an opportunity to appear, with coursel, and to present his case against such waiver?

IV. ARGUMENT AND COMMENTS

Responding to the issues of this case, the sponsors of this brief wish to make the following comments:

Issue 1

The sponsors of this brief are especially concerned with the discretionary powers granted the juvenile court to waive jurisdiction under Title 11-914 of the D.C. Code. This grant of power by Congress specifies no standard or criteria whatsoever.[16] Such discretionary power tends to make the court subject to public pressure, in particular when the juvenile is charged with the commission of an especially offensive act. Oftentime, it is the most ill and disturbed children, who most require special treatment, that are released to the adult court.

A study conducted by the National Council on Crime and Delinquency[17] of the various criteria employed by the courts in determining whether jurisdiction over a juvenile should be waived, indicate many considerations which are in conflict with the juvenile court philosophy. Rejecting such criteria as the failure of previous juvenile court treatment, the hopelessness of the case or the uncooperative attitude of the juvenile, this study observes:

> "At first glance previous failure seems a reasonable ground for transfer, but it, too, is in conflict with juvenile court purposes and philosophy, since in effect it means that the court rejects any further attempt to treat the child. Such rejection implies either inadequacy of resources, for which the child is thus made to suffer, or a desire on the part of the court to avoid recording another failure . . . .

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[16] See, by comparison, the requirement of the Standard Juvenile Court Act that waiver be preceded by a finding that retention of jurisdiction by the juvenile court will be "contrary to the best interest of the child or the public."

[17] Transfer of Cases Between Juvenile and Criminal Court, A Policy Statement by the Advisory Council of Judges, *Crime and Delinquency*, January, 1962.

> "If the juvenile court feels powerless to help . . . is the criminal court in a better position? . . . It has been held that the juvenile court is not justified in transfering a case, no matter how serious, to the criminal court unless the child's own good and the best interests of the state cannot be obtained by retention of jurisdiction . . . (p. 6)
>
> "An illustration of transfer as punishment for a child's attitude came from a study in one state which found that 'three counties engaged in the questionable practice of remanding youth to the criminal court for trial when the youth denies the allegations of the petition. . . . The threat of certification to the criminal court is also used in some instances to prevent a youth from asserting his rights'." (p. 7)

This Court should determine whether Title 11-914 of the D.C. Code, as now formulated, does provide clear standards and guidelines in waiver decisions to guarantee against abuses of the requirements of "due process" and "equal protection" contained in the Fifth Amendment to the United States Constitution.

It has been held that the due process clause of the Fifth Amendment embodies a like concept of equal protection of the laws as applied to the states under the Fourteenth Amendment. *Bolling v. Sharpe*, 347 U.S. 497 (1953). The passage of Title 11-914, D.C. Code, establishes the category of juvenile offender, which concededly rests upon a rational basis. Differential treatment of persons similarly circumstanced denies equality of protection of law, unless based on a classification which is reasonable and not arbitrary. *Goesaert v. Cleary*, 335 U.S. 464 (1948). However, the rupture of the classification of juvenile offenders by the exercise of waiver discretion by the Juvenile Court poses serious problems with regards to equal protection. No two juveniles involved in equal measure in the same offense are assured of equal treatment by the Court, since one may be retained within the privileged class and another put outside it, by a pure and simple discretionary act of the Court. It is apparent that persons similarly circumstanced may

be treated differently on an arbitrary and capricious basis, which is not subject to correction on review because the exercise of the Juvenile Court's discretion is not subject to review. Cf. *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63 (1928); *Mutual Loan Co. v. Martell*, 222 U.S. 225 (1911); *Nicol v. Ames*, 173 U.S. 509 (1898).

Because Title 11-914 of the D.C. Code establishes no standards for waiver and requires no hearing and no record, the juvenile court discretion is exercised without possible judicial review. Conceding that wide discretion has traditionally been vested in courts, the sponsors of this brief contend that the fundamental requirements of fairness imposed by the Due Process clause of the Fifth Amendment on all government officers require the opportunity for judicial review in this instance. Without the right to review, there is no way in which the discretionary act can be examined for arbitrariness and capriciousness. While the right of appeal may not be an essential element of due process if due process has been accorded in the first instance, there is no means of determining the predicative due process in this type of juvenile proceeding without judicial review. Cf. *District of Columbia v. Clawans*, 300 U.S. 617 (1936). Since, "a fair trial in a fair tribunal is a basic requirement of due process," *Re Murchison*, 349 U.S. 133, 136 (1955), the right to test the fairness of the tribunal, the Juvenile Court, by review appears to be equally a basic requirement of due process under the circumstances of discretionary waiver of jurisdiction under the provisions of Title 11-914, D.C. Code.

Absent a statutory criterion for waiver, the elementary demands of due process require a hearing on the question of waiver and representation by counsel at waiver hearings. Otherwise, the Juvenile Court, in making the waiver decision, steps from its statutory role and becomes a prosecutor. Cf. *In re Groban*, 352 U.S. 330 (1957). Assuredly the juvenile is entitled to no less protection than the adult criminal, and it is fruitless to say that he will

have these when he is treated as an adult criminal, when the Juvenile Court has poisoned the wells against him by waiver of juvenile jursidiction.

Issue 2

It is the concern of the sponsors of this brief that the Petitioner in this case was unduly deprived of the right to a hearing and the right to appear with counsel at a critical stage of the proceedings, even though these proceedings are not designated as criminal. Even absent the question of transfer to the adult court, the sponsors believe that a determination of delinquency in the juvenile court carries with it a sufficient degree of social condemnation and deprivation of liberty to require the extension of the constitutional right to counsel to juvenile proceedings. It will not do to argue that presence of counsel will tend to lend unnecessary and excessive formality to the therapy-oriented non-criminal juvenile proceedings.[18] The sponsors of this brief believe, however, that the right to formal charges, formal hearing and formal counsel are inherent in our system of law and are the guaranties as well as the burdens of ordered liberty.[19]

The sponsors believe that a child in juvenile court is entitled to the protection available to a defendant in criminal court as well as the additional protections of the juvenile court. In other words, the juvenile court proceedings should not deprive the child of constitutional protections, they should add to them.

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[18] It will not do to merely keep pointing to the non-criminal appearance of the juvenile laws. ". . . the District's appellate courts . . . may be well advised to base their appraisals of these [juvenile] processes less on the theory of the Juvenile Court Act than on the practices of the authorities operating under or in conjunction with it." Note, *District of Columbia Juvenile Delinquency Proceedings*, 49 Georgetown L.J. 322, 357 (1961)

[19] Siler, The Need for Defense Counsel in the Juvenile Court, *Crime and Delinquency*, January, 1965.

We believe this Court has indicated its support of this concept in *Gallegos v. Colorado*, 370 U.S. 49 (1962). Also relevant is *Harling v. United States*, 295 F.2d 161 (1961).

The sponsors fully support the requirements of the Standard Juvenile Court Act (1959), published by the National Council on Crime and Delinquency, which provide: "As soon as practicable after the filing of a petition, and prior to the start of a hearing, the court shall inform the parents, guardian, or custodian, and the child when it is appropriate to do so, that they have a right to be represented by counsel at every stage of the proceeding. If any of them requests it but is found by the court to be financially unable to employ counsel, counsel shall be appointed by the court, and, if necessary, compensated out of funds in the court's budget. Upon a final adverse disposition if the parent or guardian is without counsel, the court shall inform them, and the child if it is appropriate to do so, of their right to appeal. . . ."

Moreover, this Court's assertion of the right to the assistance of counsel in state criminal cases involving non-capital offenses especially calls attention for the need to consider extending the right of counsel to a child in a juvenile court proceeding leading toward the waiver of jurisdiction of that child to an adult court on capital charges.[20] The act of transferring a case to the adult court is extremely important. It is not a simple ministerial function but involves the use of the power of judging at its highest level. The decision to transfer the case to an adult court may be the most severe "sentence" that the juvenile court may impose — because it places the child in a position to receive the harsher sanctions that may be handed down by an adult court. The phase of the case when the juvenile court judge is making the "full investigation" to determine whether or

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[20] Cf. Gideon v. Wainwright, 372 U.S. 335 (1963).

not to transfer the case is a "critical stage" of the proceeding, as that term has been applied in recent Supreme Court decisions. This stage is fully as critical as the arraignment in Alabama[21] or the preliminary examination in Maryland.[22] To deny a hearing at this state, with its concomitant denial of the right to counsel, is a violation of basic constitutional rights.[23]

The Oklahoma Criminal Court of Appeals, in discussing waiver of jurisdiction over juveniles, stated: "Certainly no graver concern can confront a juvenile court than that of certification of a child for prosecution for the crime of murder." (*In re Smith*, 326 P.2d 835, 1958). Because the decision of a juvenile court to waive jurisdiction is of such momentous significance for a child's future life, its exercise requires utmost care.

Section 11-914 of the D.C. Code provides that if a child over sixteen is charged with a felony, the judge may after full investigation waive jurisdiction and order the child to be held for trial in the regular adult criminal court. The D.C. District Court has held in *United States v. Stevenson*, 170 F. Supp. 315 (1959), that the statutory requirement of "full investigation" can be discharged by the judge on an ex parte basis and without an opportunity for the juvenile to be represented by counsel. See, also, *Wilhite v. United States*, 281 F.2d 642 (1960). The same result was reached in the instant case.

Even though the juvenile court proceedings are intended as a departure from the traditional criminal law procedures, fundamental fairness requires that a juve-

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[21] Hamilton v. Alabama, 368 U.S. 52 (1961).

[22] White v. Maryland, 373 U.S. 59 (1963).

[23] See, in connection with the waiver of jurisdiction, the important dissent of Judges Bazelon and Wright in Kent v. United States, 343 F.2d 247 at 264 (1964).

nile be afforded an opportunity to speak on the issue of waiver. In the instant case the juvenile court failed to allow for a hearing and relied instead upon the juvenile's social service file; to which counsel was denied access. It must be remembered that the accusatory system which relies upon a comprehensive background "dossier" prepared outside the reach of counsel's scrutiny and objections has never earned favor in our midst. Certainly it is improper under our system of law to have the fate of a young person determined, under a statute requiring "full investigation," without ever affording him an opportunity to be heard, to present his evidence, to examine the evidence in his social service file and to be represented by counsel in all these endeavors.[24]

Recognizing the importance, timeliness and broad national application of the questions presented by this case, the undersigned file this brief in the hope that this court's decision will establish the necessary standards of fairness for juvenile courts.

Respectfully submitted,

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Of Counsel

October 25, 1965

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[24] The sponsors support and wish to call to the Court's attention the provisions of the Standard Juvenile Court Act which as a prerequisite for waiver requires a "full investigation and a hearing." (Section 13)

AMICI CURIAE

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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 104

MORRIS A. KENT, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals is reported at 343 F. 2d 247. The order denying rehearing en banc, with a dissenting opinion, is reported at 343 F. 2d 264. The opinion in the companion cases, *Kent* v. *Reid* and *Kent* v. *District of Columbia,* is reported at 316 F. 2d 331.

JURISDICTION

The judgment of the court of appeals was entered on October 26, 1964. The Chief Justice extended the time to file a petition for a writ of certiorari to and including December 24, 1964. The petition was filed on December 23, 1964, and was granted on May 3,

1965 (381 U.S. 902). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the juvenile court's waiver of jurisdiction was in keeping with statutory and constitutional requirements.

2. Whether it was plain error for the trial court to permit witnesses to refer to a set of petitioner's fingerprints, taken at the time of his apprehension on the present charges, after petitioner's counsel stipulated that these prints could be used for comparison.

3. Whether petitioner was entitled to a directed verdict on the issue of insanity.

4. Whether the judge's charge, approved by petitioner's counsel, was coercive.

STATUTES INVOLVED

11 D.C. Code 914 [now 11 D.C. Code 1553 (Supp. IV, 1965)] provided:

> **Waiver of jurisdiction in case of felony—Transfer of case**
>
> If a child sixteen years of age or older is charged with an offense which would amount to a felony in the case of an adult, or any child charged with an offense which if committed by an adult is punishable by death or life imprisonment, the judge may, after full investigation, waive jurisdiction and order such child held for trial under the regular procedure of the court which would have jurisdiction of such offense if committed by an adult; or such other court may exercise the powers conferred upon the juvenile court in this subchapter in conducting and disposing of such cases.

11 D.C. Code 929 [now 11 D.C. Code 1586 (Supp. IV, 1965)] provided in pertinent part:

Records—Inspection limited—Penalties

(a) The court shall maintain records of all cases brought before the court. Such records shall be withheld from indiscriminate public inspection but shall be open to inspection only by respondents, their parents or guardians and their duly authorized attorneys, and by any institution or agency to which a child may have been committeed pursuant to Section 11–915. Such records may, pursuant to rule of court or special order of the court, be inspected by other interested persons, institutions and agencies. As used in this subsection, the word "records" includes notices filed with the court by arresting officers pursuant to Section 11–912, the court docket and entries therein, the petitions, complaints, informations, motions and other papers filed in any case, transcripts of testimony taken in any case tried by the court and findings, verdicts, judgments, orders and decrees, and other writings filed in proceedings before the court, other than social records.

(b) The records made by officers of the court pursuant to Sections 11–908 and 11–924, referred to in this section as social records, shall be withheld from indiscriminate public inspection, except that such records or parts thereof shall be made available by rule of court or special order of court to such persons, governmental and private agencies, and institutions as have a legitimate interest in the protection, welfare, treatment, and rehabilitation of the child, and to any court before which any such child may

appear. The judge may also provide by rule or special order that any such person or agency may make or receive copies of such records or parts thereof. No person, agency, or institution which has received records or information under this section may publish or use them for any purpose other than that for which they were received.

STATEMENT

Petitioner was tried in the United States District Court for the District of Columbia on three counts each of housebreaking and robbery and two counts of rape (J.A. 1–2).[1] On March 27, 1963, the jury found him guilty on the housebreaking and robbery counts and not guilty by reason of insanity on the rape counts. As a result of the verdict on the rape counts, petitioner was committed to St. Elizabeths Hospital for treatment under 24 D.C. Code 301(d). He was given five- to fifteen-year consecutive sentences on each of the other counts, with credit to be given for all time spent in St. Elizabeths (J.A. 29).[2] The court of appeals affirmed (J.A. 35–64).

[1] "J.A." refers to the Joint Appendix filed in this Court. "Tr." refers to a bound transcript of most of the preliminary and trial proceedings. The other certified transcripts on file, containing the same material but differently paginated, will not be cited. Other papers, not found in the appendix or transcript, will be cited by their description and an appropriate identifying date.

[2] At the time of sentencing on the housebreaking and robbery counts, petitioner's counsel stated that the doctors at St. Elizabeths, where petitioner was then undergoing treatment, thought that petitioner might have to stay there "perhaps for the rest of his life" (Tr. 826–827). Petitioner's counsel then suggested that the court have the housebreaking and robbery sentences

A. *The Juvenile Court Waiver.* Petitioner, now 21 years old (see J.A. 21) and no longer subject to Juvenile Court jurisdiction (11 D.C. Code 1551(b) (Supp. IV, 1965)), first came under the authority of that court at age 14, as a result of several housebreakings and an attempted robbery. After an exhaustive investigation, including interviews with his mother, aunt and school authorities, petitioner, who was represented by counsel, was placed on probation (Tr. 622–627).

On September 5, 1961, petitioner, then 16 years old and still on probation, was taken into custody after fingerprints found at the scene of a recent housebreaking, robbery and rape matched a set of his prints on file with the police (Tr. 8–10, 178–179, 191–194). The next day petitioner's counsel and his mother met with the Juvenile Court's Social Service Director to urge against waiver of jurisdiction under 11 D.C. Code 914 (pp. 2–3, *supra*). The Director informed counsel that he could attempt to speak with the judge on the matter[8] and that action on waiver would be postponed to enable counsel to submit papers to the court (affidavit of Richard Arens, filed November 16, 1961, p. 1). Accordingly, counsel sent the court a motion

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run concurrently with the commitment on the rape counts and "give him a criminal sentence so that there will be some hope, maybe in 30 years, maybe in 40 years, that when he is free in the eyes of the hospital * * * he will not face the rest of his life in a federal penitentiary * * * (Tr. 827).

[8] In his brief (p. 13) it is alleged that "petitioner's counsel was never afforded * * * any audience by the judge of the Juvenile Court * * * ." The court below stated, however, that "[c]ounsel apparently did not press the matter of a personal interview" (J.A. 37).

requesting that petitioner be hospitalized, that counsel be given access to petitioner's Social Service file, and that a hearing be held prior to a determination as to waiver (Arens affidavit, pp. 5–6). Counsel also submitted a memorandum accompanied by a letter from one of the psychiatrists he had retained to examine petitioner in the Receiving Home for Children;[4] this psychiatrist certified that petitioner was suffering from severe psychopathology (affidavit of Dr. Leon Salzman, filed November 16, 1961). Petitioner and his mother[5] were also questioned by Juvenile Court personnel. The record also relates that a report to the judge, dated September 8, 1961, was submitted by the Juvenile Probation Section. "Part of a summary" of that report suggested "a rapid deterioration of [petitioner's] personality structure and the possibility of mental illness" (Tr. 627–628).

[4] At the instance of petitioner's counsel, two psychiatrists and one psychologist examined petitioner at the Receiving Home (Arens affidavit, pp. 2–3).

[5] Petitioner's mother (affidavit of Mrs. Kent, filed November 16, 1961) and his counsel (Arens affidavit, *supra*) stated, in support of his motion to dismiss in the district court (see pp. 7–8, *infra*), that Mrs. Kent had only been interviewed "superficially" in 1959 and for only "a few minutes" in the present proceedings. At trial, a summary of the original "superficial" interview was introduced, indicating that petitioner's aunt supplied information about the boy's adjustment "which the mother was either unwilling or too uncomfortable to give." The mother testified that she found it hard to understand her son's behavior as his economic needs had been amply met, and she expressed the belief that petitioner had been influenced by a playmate to commit the charged offenses (Tr. 623; see opinion of the court of appeals, J.A. 48, n. 11).

On September 12, 1961, the Juvenile Court announced that it had decided "after full investigation" to waive jurisdiction over petitioner as to fourteen specified offenses and any other offenses related thereto, including those involved here (J.A. 21–22).[6] Accordingly, the case was transferred to the district court and the present indictment was found by the grand jury. After unsuccessfully attacking the waiver on habeas corpus and direct appeal,[7] petitioner moved the district court to convene itself as a Juvenile Court under 11 D.C. Code 914 and to dismiss his indictment

[6] Petitioner and the *amici* make a number of unproved allegations as to petitioner's treatment by the police prior to waiver (Pet. Br. 9–11, 31; Amicus Br. 6–7). These are irrelevant to the issues presented here. When the government sought to show at trial where petitioner was taken after his arrest, defense counsel objected that the matter was not relevant, and the government withdrew the question (Tr. 179). In the hearing on the pre-trial motion to suppress evidence, however, the government related the chronology of events after petitioner's arrest. This showed that petitioner was more than once warned of his rights; that he initiated the conversation with the officers; that he talked freely of a number of his offenses and indicated where he had left certain wallets and identification papers, which were later obtained pursuant to warrants (Tr. 10–13). Defense counsel accepted the government's chronology "as being substantially accurate" (Tr. 15) and "not color[ed]" (Tr. 7). The position as to the facts taken before the district court is thus inconsistent with that expressed in petitioner's brief (pp. 9–11). In any event, all evidence obtained as a result of questioning petitioner prior to waiver was excluded from his trial under the rule of *Harling* v. *United States*, 295 F. 2d 161 (C.A.D.C.) (Tr. 16). See opinion of the court of appeals, J.A. 54–55, n. 17.

[7] Relief was denied in both actions on the ground that the proper means of reviewing the Juvenile Court's waiver is a motion to dismiss in the district court. *Kent* v. *Reid*, 316 F. 2d 331.

on the ground that the Juvenile Court's waiver was improper. At the hearing on the motion to dismiss, the court gave petitioner's social records to counsel for examination.

The district court denied both motions. It found that the Juvenile Court had complied with the statutory provision for a full investigation prior to waiver, noting that the statute did not require a judicial or quasi-judicial hearing (Tr. 19) and that none of the testimony proffered by petitioner's counsel to the Juvenile Court was relevant to the waiver investigation (Tr. 17–18).

On review of the conviction, the court of appeals held that the waiver in this case was in keeping with the statute and the *parens patriae* philosophy of the Juvenile Court. It held that the criteria for waiver formulated by the Juvenile Court (J.A. 41–43, n. 5; Appendix A, *infra*)[8] were not arbitrary or capricious. Noting that many of the relevant factors were subjective, it stated that "the essence of the juvenile court system is subjective judgment—the skill and experience of the specialist judge brought to bear upon young people in trouble. The revision of that trained judgment in a particular case by a non-specialist tribunal is a venture not to be undertaken lightly and without patent justification" (J.A. 43). The court observed that the juvenile judge was apprised of petitioner's mental problems and that the Juvenile Court's facilities for treating such

[8] The policy memorandum setting forth the criteria for waiver applied in this case is no longer in effect. See *United States* v. *Caviness*, 239 F. Supp. 545, 550 (D.D.C.).

cases were probably inadequate. It suggested that there was a greater opportunity for proper disposition of the mental aspects of the case in the district court, "especially considering the limited time available for cure and rehabilitation under a Juvenile Court commitment" (J.A. 45). The court found that, particularly in light of petitioner's having been under Juvenile Court authority for over two years prior to waiver, the "full investigation" requirement was complied with (J.A. 47). It also found that the Juvenile Court did not abuse its discretion in refusing to allow petitioner's counsel to see his social records (J.A. 51–54).

Judge Washington, concurring separately, emphasized the responsibility of the district court and court of appeals to afford careful review to a waiver determination and stated that waiver should be the exception, not the rule. He agreed, however, that in this case "the showing made was not such as to justify us in setting aside the waiver" (J.A. 61). Chief Judge Bazelon and Judge Wright, dissenting from the denial of rehearing *en banc,* urged that the court of appeals itself should have reviewed petitioner's social records and that intelligent review of the waiver could not be made "unless the reasons for it are stated *on the record*" (343 F. 2d at 265).

B. *The District Court Proceedings.* Prior to trial, petitioner was committed first to D.C. General Hospital, although the government urged that St. Elizabeths would be more appropriate (Hearing of Oct. 13, 1961), and later, without objection, to St. Elizabeths (Tr. 5–7, hearing of Jan. 8, 1962) for psychiatric ex-

amination. The doctors at D.C. General found petitioner incompetent to stand trial. They were uncertain whether he was psychotic at the time of the alleged offenses, but stated the opinion that he was a "dangerous boy" and that "long term treatment should be offered him" (Letter filed December 22, 1961). The doctors at St. Elizabeths found that petitioner was competent to stand trial, but that he was psychotic at the time of the alleged offenses and that the offenses, if committed, were the products of his disease (Letter filed April 6, 1962). On the basis of the professional testimony at a competency hearing held on March 7, 1963, the court found petitioner competent to stand trial (Hearing of March 7, 1963, before Hart, J., transcript filed October 2, 1963).[9]

At the trial, the three victims of the offenses charged in the indictment testified for the prosecution. Juanita Echols testified that she awoke about 1:00 a.m. on June 5, 1961, and saw the outline of a head above her television set. When she asked who was there, a man grabbed her by the shoulders and said, "Don't make a noise * * * all I came for is your money" (Tr. 32–34). She told him where her billfold was and he put it in his pocket (Tr. 34–35). In her distress, she dropped the pillow she had been holding in

[9] A pre-trial motion to suppress evidence was heard before the trial judge (Tamm, J.) (Tr. 3–16), who ruled that the confessions, as well as victims' wallets and identification cards which were found as a result of the confessions, were to be suppressed (Tr. 16). See note 6, *supra*.

front of her, revealing that she was unclothed above the waist. Thereupon the intruder beat her around the face, threatened to kill her if she screamed, and raped her (Tr. 37–38). Latent fingerprints found on the window ledge of Miss Echols' apartment were identified as petitioner's (Tr. 77–96).

Gloria Jean Palmer testified that she was awakened early in the morning of June 12, 1961, by a hand being placed over her mouth (Tr. 96–100). When the intruder removed his hand from her mouth, she screamed for her roommate, and the intruder fled down the fire escape (Tr. 100–101). Later, Miss Palmer found that $47.00 and her wallet had been stolen (Tr. 102–103). Petitioner's fingerprints were found on the closet door in Miss Palmer's room (Tr. 115–130).

Mary Murphy testified that she was awakened in the early morning hours of September 2, 1961, to find a man's hand on her neck (Tr. 132–138). He raped her and then fled through the kitchen window of her apartment (Tr. 136, 138–139). Later, she discovered that her wallet and $12.00 were missing (Tr. 144). Miss Murphy testified that a light was on in her room when she was attacked (Tr. 143) and identified petitioner as her assailant (Tr. 148–151). Petitioner's fingerprints were found on a table on the fire escape outside Miss Murphy's apartment (Tr. 190–208).

In the opening statement on behalf of petitioner, his counsel stated, "The defense in this case will not go to the thrusts of the crimes of rape or the crimes of housebreaking. The defense in this case will be an

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insanity defense" (Tr. 24). For convenience, the extensive evidence on this issue is summarized in Appendix B, pp. 4a–7a, *infra*.

Prior to submission of the case to the jury, the court discussed the proposed requests for instructions (Tr. 731–734). The judge did not comment upon the evidence in his charge (Tr. 778), but outlined the charges and the pertinent law, including the defense of insanity (Tr. 779–815). He also charged as follows (Tr. 815–816):

> You have before you all of the evidence which the Government and the defendant can offer in this case. The verdict which you return to the courtroom should represent your individual opinions. In other words, each of you must arrive at your own verdict; but this does not mean that your views, your opinions may not be changed by conference in the jury room. The object of the jury system is to secure a unanimous verdict by comparison of views and by arguments and by discussion among the jurors themselves. Each of you should listen with deference to the arguments of the other jurors and with a distrust of your own judgment if you find that a large majority of the jurors take a different view of the case than that which you yourself take.
>
> None of you should go into the jury room with a blind determination that the verdict should represent your opinion of the case at the moment you leave the courtroom, or that you should close your ears to the arguments of other jurors who are equally honest and equally intelligent with yourself. Accordingly, although the verdict must be the verdict of each of you

individually and not a mere acquiescence in the conclusion of your fellow jurors, the Court instructs you that you should examine the issues submitted with candor and with a proper regard and deference to the opinions of each other. It is your duty to decide this case if you can conscientiously do so. You should listen to each other's arguments with a disposition to be convinced.

If in any question put to you for a vote by your foreman, any one of you should find that you are a very pronounced minority on any question, you should appraise your situation. You should ask yourself, Why did this evidence make such an impression on me when it didn't make a similar impression on a great number of other jurors who are equally honest and equally intelligent with myself?

I repeat, your verdict must be a unanimous one. It must represent your individual view of the case, but you should not solidify your judgment in the case until you have had an opportunity to listen with an open mind to the discussion of all of the other jurors in the jury room.

In conclusion, the judge stated that the jury would not be locked up and thus there would be no pressure to reach an immediate verdict (Tr. 816–817).

The defense did not object to the charge as given but stated (Tr. 819):

I believe that the Court's charge was eminently fair as to all the defendant's requested instructions, and I think the Court's charge in toto realistically and accurately stated the law in the District of Columbia.

The court of appeals ruled that it was not error for the district court to refuse to grant petitioner's motion for acquittal, stating that "[t]he evidence we consider to have been in the precise posture which calls for submission of the issue to the jury" (J.A. 56–58). It also held that the court did not err in allowing the use of petitioner's fingerprints as evidence against him or in instructing the jury (J.A. 59–60).

INTRODUCTION AND SUMMARY OF ARGUMENT

The relatively recent development of specialized courts for the treatment of youthful offenders has engendered a great many problems, both administrative and legal. In particular, the question of the extent to which "traditional constitutional guarantees apply to juvenile court proceedings" (*Amicus* Brief, p. 2) has aroused a great deal of concern.[10] We agree that this broad question is important, but observe at the outset that it is not involved in the present case.

[10] See Ketcham [the judge who transferred jurisdiction in this case], *Unfilled Promise of Juvenile Court*, in *Justice for the Child* 22–43 (Rosenheim ed., 1962); Allen *The Borderland of Criminal Justice*, pp. 16–24, 42–61; Handler, *The Juvenile Court and the Adversary System*, 1965 Wis. L. Rev. 7; Paulsen, *Fairness to the Juvenile Offender*, 41 Minn. L. Rev. 547 (1957); Dembitz, *Ferment and Experiment in New York: Juvenile Cases in the New Family Court*, 48 Cornell L.Q. 499 (1963); Antieau, *Constitutional Rights in Juvenile Courts*, 46 Cornell L.Q. 387 (1961); Shears, *Legal Problems Peculiar to the Juvenile Court*, 28 D.C.B.A.J. 486 (1961); see also, Hearings Before the Subcommittee to Investigate Juvenile Delinquency of the Senate Judiciary Committee, 86th Cong., 1st Sess., pt. 1, pp. 15–29 (Testimony of Prof. Tappan and Dr. Kahn).

Indeed, many of the constitutional problems being debated in other jurisdictions are already settled in the District of Columbia. Thus, an accused juvenile in the District is entitled to a jury trial on the issue of delinquency. 16 D.C. Code 2307 (Supp. IV, 1965); cf. Federal Juvenile Delinquency Act, 18 U.S.C. 5033. It is also settled in this jurisdiction that no statement obtained from a juvenile prior to waiver of jurisdiction is admissible in a subsequent criminal trial (*Harling* v. *United States*, 295 F. 2d 161 (C.A. D.C.)), and that a juvenile has the right to counsel at delinquency hearings (*Shioutakon* v. *District of Columbia*, 236 F. 2d 666 (C.A. D.C.); *McBride* v. *Jacobs*, 247 F. 2d 595 (C.A. D.C.)). The only Juvenile Court question presented here is a narrow one: Was the Juvenile Court's waiver of jurisdiction accomplished in compliance with the statute and without fundamental unfairness to petitioner?

The Juvenile Court Act of 1938 represented an imaginative experiment in the treatment of youthful offenders. In embarking on this venture, Congress necessarily placed great reliance on the specialists entrusted with the successful operation of the court's corrective programs. It sought to promote flexibility in the process by refusing to restrict the court's personnel to the conventional modes of procedure developed in the criminal field.[11] The legislative judg-

[11] The provision for a jury trial upon demand on the question of delinquency (16 D.C. Code 2307 (Supp. IV, 1965)), while not "in accord with the spirit of the [Juvenile Court] law," was inserted only because it was felt that Article III, Section 2 of the Constitution required it. See H. Rep. No. 177, 75th Cong., 1st Sess, p. 4; 81 Cong. Rec. 1004.

ment—traditionally entitled to a high degree of respect—is worthy of particular deference in this young and still experimental area of endeavor.

I

The original Juvenile Court Act of 1906 created, in effect, a specialized police court for children under seventeen. The 1938 revision, however, created a court designed to treat youthful offenders by non-criminal process. The Act contained the "safeguard" under which the court could waive jurisdiction over cases involving serious offenses, and provided that waiver could be accomplished after a "full investigation."

The Due Process Clause does not require an adversary hearing on this question. The constitutional requirement is fundamental fairness in the decision-making process, but the test of fairness is a flexible one, tailored to the nature and consequences of the particular inquiry.

The nature of the decision in this case was not such as to render an adversary presentation constitutionally mandatory. The decision to be made was whether petitioner was charged with a serious offense and evidenced deep-seated problems calling for long-term treatment, beyond the existing resources of the Juvenile Court. The elements in this decision were readily obtainable in reliable form through an administrative investigation, and petitioner has not suggested how the court would have been aided by a live hearing.

Nor were the consequences of the decision so grave as to compel a hearing as a prophylactic measure.

The Juvenile Court's decision was reviewed in the district court, which had authority to sit as a Juvenile Court itself. And in the district court trial petitioner was afforded the full measure of constitutional protections and had access to treatment facilities at least as satisfactory (and probably better than) as those available in the Juvenile Court.

The practice with regard to waiver in the States is varied. Some States which have transfer provisions require hearing prior to transfer. Our examination of the authorities, however, suggests that most States—like the District of Columbia—do not require hearings. The question is typically treated as one for the application of legislative judgment, as is appropriate in this relatively new and developing area.

The waiver decision is, we submit, analogous to a judge's determination of an appropriate sentence, or to the decision whether a defendant who has been sentenced to death has become insane after sentencing, so that the sentence may not be carried out. This court has held that criminal-trial safeguards are not necessary for these inquiries, notwithstanding the drastic consequences of decision in those situations.

There was no fundamental unfairness in denying petitioner's request for an adversary hearing or his counsel's request to see confidential Juvenile Court records. Neither of these procedures was essential to the fairness of the Juvenile Court proceeding. Nor is there merit to the claim that the court was acting without ascertainable standards. The criteria for waiver applied in this case had been announced more than two years before the decision in question.

II

The statutory requirement of "full investigation" was compiled with here. Counsel consulted with the Social Service Director and communicated with the judge. The court had before it ample information on which to base its decision to waive—including data gathered over the years petitioner was on probation. The decision to waive was in full accord with the congressional intent in making provision for waiver, and it was properly sustained by the district court.

Petitioner's counsel had no statutory right to see his social records. The statute plainly contemplates that "official records" may be shown to "attorneys" but makes no similar provision as to the social records. The history of the Act, moreover, plainly shows that those to whom the social records were to be available were agencies treating the child *after* disposition of his case by the Juvenile Court.

III

There was no reversible error in petitioner's trial in the district court.

Petitioner cannot now object to the use of fingerprints which his counsel expressly stipulated could be used for comparison with impressions found at the scenes of the three housebreakings. In any event, the prints were properly admissible. They were not acquired in the performance of any "official duties" of the Juvenile Court under 11 D.C. Code 929(c) (now 11 D.C. Code 1586(c)). Nor were they the product of an illegal arrest or unduly delayed detention. Indeed,

the record fails to support any allegation of illegal arrest or unduly delayed detention.

The evidence as to petitioner's mental condition was in dispute, and was, therefore, precisely in a posture to go to the jury. There was expert testimony fully supporting the jury's verdict.

The court's instruction in this case was not coercive. The court made absolutely clear that each juror was to decide on the basis of his individual judgment.

ARGUMENT

I

THE JUVENILE COURT FOLLOWED CONSTITUTIONAL PROCEDURES IN DETERMINING WHETHER TO "WAIVE" JURISDICTION OVER PETITIONER

Petitioner's initial challenge to the validity of his conviction turns upon the constitutionality of the procedure followed by the Juvenile Court in determining whether to waive jurisdiction over him. Petitioner contends in this regard that he was entitled (1) to examine and rebut the evidence relied on by the Juvenile Court (Pet. Br. 32–34, 41–42); (2) to present "his case against waiver" in an adversary hearing (Pet. Br. 34–36); and (3) to be represented by counsel in the Juvenile Court (Pet. Br. 36–37). All of these procedural claims rest on the premise that the safeguards which are constitutionally guaranteed to an accused at all critical stages of a criminal prosecution apply in full measure to the proceeding involved in this case. We submit that the decision of the Juvenile Court for the District of Columbia whether or not to "waive" its jurisdiction over a par-

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ticular juvenile offender is not, in light of the history of that body and its contemporary functions, the type of determination which requires all the safeguards of a criminal trial. The procedure customarily followed by the Juvenile Court (which was followed here) is calculated to produce an informed and intelligent decision on the questions underlying the issue of waiver with a minimum of formality and delay. In view of the limited purpose and consequences of the waiver inquiry, that procedure satisfies constitutional standards of fairness.

Waiver of jurisdiction by the Juvenile Court does not, *ipso facto,* result in the deprivation of life, liberty or property. Nor is it, in any ordinary sense, a transfer of judicial power from one tribunal to another. The history of the Juvenile Court for the District of Columbia (which we recount at pp. 22–25, *infra*) demonstrates that, as Judge McGowan noted below (J.A. 52, 343 F. 2d at 258), the Juvenile Court "administers a non-criminal process in the nature of social service work directed to the accommodation of the interests of the juvenile and of society." By vesting "original and exclusive jurisdiction" over certain offenders in the Juvenile Court (11 D.C. Code 1551), Congress expressed a legislative judgment that those as to whom the Juvenile Court may *not* waive jurisdiction—*i.e.,* accused juvenile misdemeanants and persons under 16 who are charged with a felony not punishable by death or life imprisonment—should invariably be treated within this system of "social service work" rather than by the ordinary processes of the criminal law. But with respect to "waivable"

juveniles such as petitioner—*i.e.*, those who are accused of a felony punishable by death or life imprisonment and any accused felon over the age of 16—Congress has merely assigned to the Juvenile Court the task of determining, in the first instance, whether a social-service or criminal remedy is more appropriate in the particular case. That decision is similar in kind to decisions which have not traditionally been thought to require adversary proceedings, and it usually depends upon the resolution of issues which are not suitable for full-scale evidentiary hearings.

We agree, of course, that Juvenile Court proceedings, like all governmental action, must satisfy fundamental standards of fairness. See, *e.g.*, *Pee* v. *United States*, 274 F. 2d 556, 559 (C.A. D.C.). We submit, however, that what constitutes fair procedure within the meaning of the Fifth Amendment's Due Process Clause depends on the nature and consequences of the particular governmental inquiry at issue. Where, as here, Congress has authorized extrajudicial treatment of certain kinds of criminal offenders, the decision whether an individual accused can effectively be treated by such special techniques need not be made pursuant to the same procedures as the Constitution affords for the determination of guilt or innocence on criminal charges. The inquiries differ in kind, and these differences justify procedural distinctions. As this Court noted in *Federal Communications Commission* v. *WJR, Inc.*, 337 U.S. 265, 275–276, to construe the due process guarantee of the Fifth Amendment as "a term of fixed and invariable content" would "do

violence * * * to the constitutional power of Congress to devise differing administrative and legal procedures appropriate for the disposition of issues affecting interests widely varying in kind." That principle applies here.

A. THE HISTORY OF THE STATUTE SHOWS THAT THE NATURE OF THE WAIVER INQUIRY DOES NOT WARRANT THE PROCEDURAL SAFEGUARDS REQUIRED FOR CRIMINAL TRIALS

The Juvenile Court Act of March 19, 1906 (34 Stat. 73), vested in the Juvenile Court for the District of Columbia original and exclusive jurisdiction over offenses committed by persons under 17 years of age, which were "not capital or otherwise infamous" and, with certain exceptions, not punishable by imprisonment in the penitentiary.[12] For more than thirty years, the court had "jurisdiction of petty offense and misdemeanors only * * * [and was required to] hold children who have committed greater offense for the action of the grand jury." S. Rep. No. 530, 75th Cong., 1st Sess., p. 2. The early court, whose hearings and records were open to the public (*ibid.*), was little more than a specialized police court for persons under seventeen.

In 1938, Congress completely revised the Juvenile Court Act, incorporating therein the main features of the National Probation Association's Standard

[12] The 1906 Act was patterned after various State juvenile court acts. The jurisdiction it conferred was a composite of that granted in 1885 to the Washington Humane Society, in 1892 to the Board of Children's Guardians, and in 1901, to the District's police courts. See H. Rep. No. 2169, 59th Cong., 1st Sess., pp. 10–13.

Juvenile Court Act. 52 Stat. 596. The new statute, designed chiefly "to change the court from a criminal to a chancery court" (H. Rep. No. 177, 75th Cong., 1st Sess., p. 2), gave the court original and exclusive jurisdiction over children under 18 years of age accused of violating any law and provided that delinquency proceedings and court records would be closed to the general public. In addition, the act contained what was described as a "safeguard," giving the court discretion to refer cases involving serious offenses to the district court (*id.*, pp. 2–3).

As originally enacted, the "waiver" provision (§ 13, 52 Stat. 599) applied only in the case of "a child sixteen years of age or older [who] is charged with an offense which would amount to a felony in the case of an adult * * *." In 1947, as a result of the public clamor arising out of the murder of a policeman by a 14-year-old boy, whom the Juvenile Court could neither transfer to district court nor hold beyond age 21 (93 Cong. Rec. 3354, 4566), Congress added the clause authorizing waiver of "any child charged with an offense which if committed by an adult is punishable by death or life imprisonment." In either situation, the decision whether to retain jurisdiction was to be made "after full investigation."

Congress explained the 1947 amendment as follows (H. Rep. No. 242, 80th Cong., 1st Sess., p. 2):

> * * * Despite the fact that public interest and safety may demand that these offenders be detained and treated for extended periods, the jurisdiction of the court terminates when the child reaches his majority and he is returned to

> society, even though his return may, in fact, constitute a hazard to the community or handicap law enforcement * * *.
>
> The amendment permits the juvenile court to waive jurisdiction in the case of any child who commits an offense punishable by death or life imprisonment. These offenses include kidnapping, murder, and rape.
>
> It is recognized that the number of children who are charged with the serious offenses enumerated will undoubtedly be very small. It is also recognized that some of the children who become involved in such difficulties will respond to treatment in the care and under the supervision of agencies available to the juvenile court. It is equally true, however, that certain of these offenders who present deep-seated problems must be provided with long-term institutional care, and must not be returned to the community while there is any danger of their repeating their offenses. The proposed amendment permits the juvenile court *to determine which children will be amenable to the treatment resources at its disposal* and to transfer its jurisdiction in cases demanding such action. [Emphasis added.]

The purpose of the waiver inquiry, as disclosed by the above legislative history, is to determine whether an accused juvenile has evidenced "deep-seated problems" calling for "long-term institutional care" which may not "be amenable to the treatment resources" which the Juvenile Court has at its disposal.[13] The

[13] The court of appeals has read the statute in the same manner: "The original-and-exclusive-jurisdiction clause, coupled with the waiver clause, is merely a procedural device for putting

elements entering into a decision on this question—the accused's age, the seriousness of the alleged crime, his prior criminal record, his history of mental illness, the treatment facilities available to the court, and the adequacy of short-term treatment (*i.e.*, until the accused reaches his twenty-first birthday [14])—may be fully canvassed in a careful administrative investigation such as was conducted in this case. Petitioner does not suggest that any issues of credibility were involved here which would have warranted cross-examination or other adversary procedures. There may, of course, be instances in which the critical question on which waiver depends could be clarified by an evidentiary hearing. *Cf. United States* v. *Dickerson*, 271 F. 2d 487 (C.A.D.C.). Whether a hearing would be required in those circumstances is a question which need not be reached in this case; it has not been suggested that any such issue exists here.

B. THE CONSEQUENCES OF THE WAIVER DECISION ARE NOT SO DRASTIC AS TO REQUIRE THAT IT BE MADE ONLY PURSUANT TO PROCEDURES APPROPRIATE IN CRIMINAL TRIALS

The nature of the waiver inquiry does not lend itself, as we have shown, to adversary procedures of the sort followed in criminal trials. Equally significant, we believe, is the fact that a waiver of Juvenile Court

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child offenders within the remedial treatment of the Juvenile Court if it appears after investigation that such disposition is in the interest of the public and of the child." *Briggs* v. *United States*, 226 F. 2d 350, 351 (C.A.D.C.).

[14] Under 11 D.C. Code 1551 the Juvenile Court may not retain a person in its custody beyond his twenty-first birthday. Hence any treatment prescribed by that court must automatically terminate when the accused turns twenty-one.

jurisdiction does not result directly in any deprivation of life, liberty or property. It releases an accused to the ordinary processes of the criminal law with all its constitutional protections. Its effect is merely (1) to make the proceedings against him public, (2) to render corrective treatment beyond the age of 21 possible, and (3) to authorize the imposition of adult penalties such as imprisonment in a federal penitentiary. The waiver deprives the accused of nothing other than the statutory presumption that society is better served if youthful offenders are treated by a social service agency rather than by judicial criminal process. The district court which assumes jurisdiction over the offender may, if it chooses, exercise its own discretion to sit as a Juvenile Court, thereby again making the proceedings private and limiting the available corrective treatment to that which a Juvenile Court may impose. *United States* v. *Anonymous,* 176 F. Supp. 325 (D.D.C.).[15] If the district court decides not to sit as a juvenile tribunal, as was the case here, the accused is afforded the full panoply of constitutional safeguards. In addition, he is guaranteed that no statement given by him prior to waiver will be used at his trial. *Harling* v. *United States,* 295 F. 2d 161 (C.A. D.C.). If, as here, there is a question as to mental capacity, that issue may be considered in the district court at least as fully as

[15] The district court first reviews the Juvenile Court's waiver to determine whether the "full investigation" prescribed by statute was conducted and whether the Juvenile Court's result was supported by the material before it.

it can be with the more limited resources of the Juvenile Court. And if the accused is found incompetent to stand trial, adequate facilities for treatment are available to him. Finally, if he is found guilty of an offense, the juvenile may be given corrective treatment similar, in all material respects, to that provided by the Juvenile Court. See the rehabilitative provisions of the Federal Youth Corrections Act (18 U.S.C. 5005–5026).

The waiver inquiry involved here is, we submit, not materially different from the question which would have to be resolved by a prosecutor in any jurisdiction not having a Juvenile Court. If a juvenile were believed to have committed a felony in any such jurisdiction, the prosecutor would appropriately consider the desirability and availability of corrective treatment other than formal criminal process in determining whether or not to institute criminal charges. He would be compelled to weigh considerations such as the age and record of the accused, the gravity of the offense of which he is suspected, the availability of alternative treatment, the probability that such treatment would be effective and any other peculiarities of the case bearing upon the decision whether or not to prosecute. This decision has never been thought to be the kind requiring all the safeguards of a criminal trial. That is partly because the decision does not, in and of itself, deprive the accused of anything; it merely determines whether he should be given the benefit of certain special therapeutic processes which are believed to be generally

more effective with youthful offenders than ordinary criminal sanctions.

The Juvenile Court Act does, of course, give a youthful offender a statutory right to be treated differently from an adult accused, and he may be deprived of this right only if the Juvenile Court lawfully waives its jurisdiction. We agree that the Juvenile Court may not waive arbitrarily and must afford fair procedures in administering this right. But in determining whether the Constitution compels the Juvenile Court to afford criminal-trial safeguards in executing this function, it is material to consider that the effect of the waiver is no different from a prosecutor's decision to impanel a grand jury and seek an indictment. Indeed petitioner contends that the Juvenile Court's decision amounts to a finding of "probable cause" (Pet. Br. 29). It is instructive to note, in this regard, that the finding of probable cause which supports an indictment or a search warrant may occasionally be made *ex parte* by a grand jury or a commissioner, and that no adversary hearing or right to examine all the evidence is afforded.

C. A SURVEY OF THE STATE PRACTICES DISCLOSES NO CONSENSUS REGARDING THE NEED FOR ADVERSARY HEARINGS PRIOR TO WAIVERS OF JUVENILE COURT JURISDICTION

Since there is no constitutional prohibition against the trial of juvenile offenders in the regular criminal courts (see *Haley* v. *Ohio,* 332 U.S. 596, 603 (concurring opinion)), the scope of Juvenile Court jurisdiction and the criteria for waiver in each State are based upon the statutes of that particular State.

Thus, in considering the question whether the waiver decision in the District of Columbia is of such a nature or carries such consequences as to warrant the imposition of a hearing requirement, we have necessarily confined ourselves to a discussion of the District of Columbia Juvenile Court Act. The practices in other jurisdictions, however, are not without relevance. See *Leland* v. *Oregon*, 343 U.S. 790, 798.

The statutory provisions in this field vary greatly from State to State.[16] In some States, where the juvenile courts are confined to treating very young persons or are precluded from dealing with serious crimes, there is generally no provision for transfer of jurisdiction and, consequently, no hearing requirement. See Iowa Code Ann. § 231.1; Annot., 48 A.L.R. 2d 663; cf. N.Y. Family Court Act § 715. Some form of transfer provision exists in approximately thirty States, but the criteria are so varied as to make a meaningful comparison impossible. While some State statutes expressly require a hearing in addition to a "full investigation" prior to waiver,[17] our examination indicates that most of the State statutes with transfer provisions do not call

[16] See Hearings Before the House Committee on the District of Columbia on H.R. 6747, To Amend the Juvenile Court Act of the District of Columbia, 87th Cong., 1st Sess., p. 63 (table); National Council of Juvenile Court Judges, *Directory and Manual* 306–337 (chart).

[17] See, *e.g.*, Alaska Stat., Welfare and Institutions, § 47.10.06; Del. Code Ann. 11 § 2711; Idaho Code Ann. § 16–1806; Mass. Gen. Laws Ann. c. 119 § 61; Minn. Stat. Ann. § 260.125(c); Mo. Rev. Stat. § 211.071; Tenn. Code Ann. § 37–264; Utah Code Ann. § 55–10–86; Va. Code Ann. 16.1–176; cf. N.H. Rev. Stat. Ann. 169:21 ("before hearings").

for a hearing. The Supreme Court of New Jersey, considering the objective nature of the waiver criteria in that State, has held that a limited hearing prior to waiver is required. *State* v. *Van Buren*, 29 N.J. 548.[18] The courts in other States, however, have refused to impose a hearing requirement where none is provided by statute. See, *e.g.*, Re *Castro and Others*, 44 Hawaii 455, 462; *Hall* v. *Commonwealth*, 231 Ky. 473, 475.[19] In short, there is no national consensus other than the generally accepted view that the practice in this area depends on the judgment of the legislatures—which, in turn, have been guided by the experience gained by Juvenile Court specialists as the youth correction system matures.

D. OTHER DETERMINATIONS IN THE COURSE OF THE CRIMINAL PROCESS WHICH HAVE MORE DRASTIC CONSEQUENCES THAN THE WAIVER DECISION MAY CONSTITUTIONALLY BE MADE WITHOUT THE PROCEDURES REQUIRED FOR DETERMINING GUILT OR INNOCENCE

We have discussed at pp. 27–28, *supra*, our view that the matter of waiver is analogous, in many respects, to a prosecutor's decision whether or not the circumstances of the alleged crime and the character of the offender warrant the institution of formal criminal proceedings. In addition, we submit that the nature of the waiver inquiry is substantially similar to the inquiry which a court must conduct in arriving at an appropriate criminal sentence. In both instances,

[18] See also *State* v. *Tuddles*, 38 N.J. 565; cf. *Goodlet* v. *Goodman*, 34 N.J. 358, certiorari denied, 368 U.S. 855.

[19] Contrary to petitioner's assertion (Pet. Br. 36, n. 22), there is nothing in *Childers* v. *Commonwealth*, 239 S.W. 2d 255 (Ky.), to indicate that the court "viewed a hearing [as] necessary for a valid transfer of jurisdiction * * *."

among the major relevant considerations are the nature of the offense, the circumstances of its commission, the need for protecting the community against the offender, the emotional and mental condition of the accused, and the accused's prior record (compare Appendix A, pp. 1a–3a, *infra*, with *Policies and Standards for Sentencing*, 27 F.R.D. 389). The sentencing decision has, of course, an immediate and direct impact—it fixes the duration of a term of imprisonment or directs whatever other corrective treatment the judge believes to be appropriate, extending even to the imposition of capital punishment. Notwithstanding the more drastic consequence of the sentencing inquiry, this Court has held that a criminal defendant has been afforded due process of law even if his sentencing judge relies upon out-of-court information unknown to the defendant in arriving at his sentence. *Williams* v. *New York*, 337 U.S. 241. And while Rule 32, Fed. R. Crim. P., entitles a criminal defendant "to make a statement in his own behalf and to present any information in mitigation of punishment" (see *Green* v. *United States*, 365 U.S. 301), we have found no decision holding that a defendant is entitled to a pre-sentence adversary hearing. *Cf. Williams* v. *Oklahoma*, 358 U.S. 576, 582–583.

A further analogy can be drawn, we believe, to this Court's decision in *Solesbee* v. *Balkcom*, 339 U.S. 9, which held that the informal procedures followed by the Governor of Georgia in determining whether a convicted defendant sentenced to death was insane (so that he could not, under Georgia law, be executed) was "not a denial of due process of law" (339 U.S. at

14) notwithstanding the failure to provide for an adversary hearing or for a judicial finding. The dissent in *Solesbee* (on which additional dissenting views were based in *Caritativo* v. *California*, 357 U.S. 549) rested on the premise that it was unconstitutional for a State to execute a person who had become insane after sentencing. The present case involves no similar underlying constitutional issue. There is no constitutional bar against subjecting juvenile offenders to ordinary criminal process. See *Haley* v. *Ohio*, 332 U.S. 596, 603 (concurring opinion). Hence the issue here is whether procedures short of those followed in criminal trials may be used in determining whether an accused is entitled to a *statutory*, rather than *constitutional*, right. We submit that if the determination involved in *Solesbee*—which resulted directly in a deprivation of life—could constitutionally be reached after informal procedures lacking any adversary hearing, the far less drastic decision made here by the Juvenile Court cannot be declared constitutionally invalid because it lacked that safeguard of a criminal trial. See also *Burns* v. *United States*, 287 U.S. 216, 219–223.

E. FAIR PROCEDURES WERE FOLLOWED IN THIS CASE

We turn now to petitioner's particular complaints regarding the procedures followed by the Juvenile Court. When measured against the applicable standard of fairness, rather than by what is required in criminal trials, the course followed by the Juvenile Court, we believe, falls well within constitutional bounds.

(1) *"Secret" evidence.*—Petitioner's claim is essentially that his counsel was improperly denied access to the Social Service file[20] prior to the Juvenile Court's waiver. But the Juvenile Court was entitled to rely on such matter just as a district court may rely on out-of-court information unknown to a defendant in fixing a sentence. See *Williams* v. *New York,* 337 U.S. 241, and pp. 30–32, *supra.* The records involved here were simply the product of the "full investigation" into petitioner's amenability to treatment within the facilities available to the court. They were court records protected by statute against disclosure (see pp. 39–41, *infra*), and petitioner's counsel had no statutory or constitutional right to see them. Moreover, petitioner was shown the social records by the district court, and he then had an opportunity to make whatever contentions were available to him from these records as a basis for attacking the validity of the waiver and urging the district court to constitute itself a Juvenile Court. He did not then, nor does he now, claim that any information therein took him by surprise or that statements found in the records were untrue.

(2) *Hearing.*—Petitioner was permitted to submit documents to the Juvenile Court and was advised that he could attempt to speak with the judge (pp. 5–6, *supra*). He did not, as the court below noted, "press the matter of a personal interview" (J.A. 37), but he did request a hearing, which was denied. Petitioner

[20] The records in question consist of "background psychological, sociological and economic data to inform the juvenile authorities on treatment of the child." Court of appeals' opinion, J.A. 53.

contends that at such a hearing he could have "adduced evidence to show that he was properly susceptible to rehabilitation under Juvenile Court auspices" (Pet. Br. 34), but no explanation is afforded as to why this evidence could not have been adduced by documentary proof. Petitioner did submit a memorandum and a letter from a psychiatrist, and any additional evidence along this line would doubtless have been accepted and considered. A full-scale evidentiary hearing would have been meaningful only if there were some factual issue on which live examination and cross-examination would have been helpful. Petitioner never made any such claim and makes none now. In light of the issues on which the waiver decision turned (pp. 25–28, *supra*), it is most unlikely that any live hearing would have been of assistance to the Juvenile Court. Since no full-scale hearing is required by statute (pp. 35–36, *infra*), the court acted within its discretion in deciding the question of waiver on the basis of the documents before it.

(3) *Assistance of Counsel.*—Petitioner retained counsel almost immediately upon arrest, and counsel met with staff members of the Juvenile Court on the day after arrest (p. 5, *supra*). Petitioner's claim in this regard must therefore refer to the fact that counsel was not permitted to examine petitioner's social records or to appear at a live hearing in the Juvenile Court. For the reasons stated above (pp. 19–33, *supra*), we do not believe that these circumstances violated petitioner's constitutional right to due process of law.

(4) *Reasonable and Ascertainable Standards.*—*Amici* contend that the constitutional flaw in this proceeding was that the Juvenile Court's waiver was not made pursuant to ascertainable criteria which were subject to judicial review (*Amicus* brief, pp. 8–11). In fact, however, the criteria used in this case had been published by the Juvenile Court nearly two years earlier. See Appendix A, pp. 1a–3a, *infra.* It was then clear by what standards the waiver decision would be made. The fact that the criteria were not included in the statute does not invalidate the statutory scheme. For in an area such as this one, where the frontiers of knowledge are expanding, it was and remains desirable for the legislature to delegate the enumeration of specific criteria to those who daily encounter the problems which gave rise to the legislation.

II

THE JUVENILE COURT RULINGS WERE CONSISTENT WITH THE GOVERNING STATUTE

A. PETITIONER WAS ACCORDED THE "FULL INVESTIGATION" REQUIRED BY 11 D.C. CODE 1553

"Full investigation" has consistently been interpreted by the courts of the District of Columbia—whose construction of statutes having only local application is entitled to great, if not controlling, weight (see *Fisher* v. *United States,* 328 U.S. 463, 476–477)—to mean only "that the judge be fully advised of relevant facts, by such means as are available to him through the various branches of the Court, so that he may intelligently exercise his discretion." *United*

States v. *Stevenson,* 170 F. Supp. 315, 318 (D.D.C.). See also *Wilhite* v. *United States,* 281 F. 2d 642, 643 (C.A. D.C.); *Kent* v. *Reid,* 316 F. 2d 331, 333, n. 6 (C.A. D.C.), *United States* v. *Anonymous,* 176 F. Supp. 325, 326 (D.D.C.); *United States* v. *Caviness,* 239 F. Supp. 545, 549 (D.D.C.). Apart from any constitutional requirement (pp. 19–28, *supra*), the language of the statute plainly contemplates that "no formal hearing is required on a waiver of jurisdiction to the District Court." *Wilhite, supra,* at 643. Indeed, as the court stated in *Stevenson, supra,* at 318:

> To construe the statute otherwise would place an undue and unnecessary burden upon the judge, would be of little or no advantage to the child whose case is under consideration, and would inure to the detriment of other youngsters by denying them adequate and timely consideration by the judge.

The investigation in this case was "full" within the meaning of the statute, and the court's decision was supported by the record before it. Congress plainly indicated that waiver would be appropriate in cases involving "offenders who present deep-seated problems [and who] must be provided with long-term institutional care" (H. Rep. No. 242, 80th Cong., 1st Sess., p. 2). The Juvenile Court in this case had before it ample information on which to base a finding that petitioner was in this category. Petitioner, who was suspected of fourteen felonies, including three rapes and four other sexual assaults (see J.A. 21–22), had been under the court's scrutiny for more than two years prior to waiver. Petitioner's counsel

and his mother conferred with the court's Social Service Director, who is responsible for the staff's recommendation to the judge on the appropriateness of retaining jurisdiction. See Note, *District of Columbia Juvenile Delinquency Proceedings: Apprehension to Disposition,* 49 Geo. L. J. 322, 341 (1960).[21] Counsel "did not press" (J.A. 37) for an opportunity to appear personally before the judge, but he did submit, for the judge's consideration, a report from a psychiatrist retained to examine petitioner at the Receiving Home for Children. The judge also had a report on petitioner's mental condition by the court's own staff.

In his motion to dismiss in the district court, petitioner alleged that the Juvenile Court's investigation was inadequate because it did not include interviews with petitioner's father (who had been separated from his mother since petitioner was two years old (Tr. 218, 622–623)) or with his school principal. It was also alleged that petitioner's mother was interviewed for only "a few minutes" and that the court did not have full psychiatric information. As the court below correctly found, however, none of these allegations raises a substantial issue as to the court's compliance with the legislative mandate of "full investigation" (J.A. 46–48; see also Tr. 17–18, hearing of February 5, 1963, before McGuire, C.J.). Although petitioner's

[21] See Handler, *The Juvenile Court and the Adversary System: Problems of Function and Form*, 1965 Wis. L. Rev. 7, in which the author concludes that an adversary presentation is more appropriate at the administrative, rather than at the judicial, stage of Juvenile Court proceedings.

counsel was given access to petitioner's entire Social Service file in the district court, he has made no showing that any significant additional data could have been adduced through further investigation. Counsel did assert in his memorandum to the Juvenile Court that adequate facilities for treating petitioner were available at D.C. General Hospital (Affidavit of Richard Arens, filed November 16, 1961). But the experienced Juvenile Court judge was doubtless aware of the hospital's resources.

The Juvenile Court was warranted in viewing the present case as beyond its limited competence. That court reasonably concluded that if petitioner was mentally competent to stand trial, the seriousness and frequency of the alleged offenses justified a district court trial—particularly since the Juvenile Court had been unsuccessful in controlling petitioner's behavior during his two-and-a-half years of probation. If on the other hand, petitioner was mentally incompetent at the time of trial or, as the jury determined, mentally irresponsible at the time of certain of the alleged offenses, only the district court could provide the necessary long-term treatment. In short, under criteria emphasized by Congress (see p. 24, *supra*) as well as those established by the leading authorities in this field,[22] the investigation in the

[22] See, *e.g.*, The National Probation and Parole Association, *Standard Juvenile Court Act* § 13, comment; *Standards for Specialized Courts Dealing with Children*, Children's Bureau Publication No. 346–1962, pp. 26–28; cf. Rubin, *Trends in Juvenile Court Philosophy*, 7 Social Work 53, 54–55 (1962); *In re Heist*, 11 Ohio Op. 537; *State* v. *LaPierre*, 39 N.J. 156.

present case brought forth sufficient information to warrant the Juvenile Court's decision that petitioner's interests and those of the public would not be served by reliance upon the limited resources of the Juvenile Court.

We agree with the court below (J.A. 43, n. 6) that it might have been useful for the Juvenile Court to have stated on the record its reasons for waiving jurisdiction in this case, but as we have shown, and as the district court and the court of appeals found, the record on its face shows ample support for the Juvenile Court's determination.

B. PETITIONER'S COUNSEL HAD NO STATUTORY RIGHT TO EXAMINE PETITIONER'S SOCIAL RECORDS

Contrary to petitioner's contention (Pet. Br. 41-42), there was no statutory requirement that he be furnished the disputed files by the Juvenile Court. The statute (then 11 D.C. Code 929, pp. 3–4, *supra*) provided that the ordinary court records "shall be open to inspection only by * * * duly authorized attorneys" (Section (a)) but that the social records, by contrast, "shall be made available * * * by * * * special order of court [only] to such persons, governmental and private agencies, and institutions as have a legitimate interest in the protection, welfare, treatment, and rehabilitation of the child * * *" (Section (b)).

The history of this provision is instructive. As we have noted (*supra*, p. 22) the original Juvenile Court Act had no provision for privacy of hearings or records. The 1938 Act, however, provided as follows (§ 28, 52 Stat. 603):

> The court shall maintain records of all cases brought before it. Such records shall be open to inspection by respondents, their parents or guardians, or their duly authorized attorneys, but otherwise only by order of the District Court of the United States for the District of Columbia * * *.

As the Act made no mention of the social records, the then judge of the Juvenile Court construed it to mean that she had no authority to divulge those records to anyone other than the staff of the court.

The record-inspection provision in its present form was enacted to correct the adverse effects of the judge's ruling as to the social records (66 Stat. 134; 98 Cong. Rec. 1305–1306, 5974–5976). The problems which Congress sought to correct were discussed in the committee reports (H. Rep. No. 1937, 82d Cong., 2d Sess., pp. 2, 4; S. Rep. No. 1195, 82d Cong., 2d Sess., pp. 2–3) as follows:

> This ruling has had the effect of withholding information from certain agencies which the agencies need to carry on their work properly. * * * It is necessary that the Board of Public Welfare and other institutions to which children may be committed have the benefit of the investigations made by the staff of the juvenile court. Otherwise such agencies are required to duplicate the work of the court, with the attendant delay, when it is to the interest of the child that such institutions have the benefit of the social history of the child at the earliest possible moment.

As the legislative history shows, Congress intended only to avoid unnecessary duplication of effort by

making the social records available to the appropriate agencies after disposition of the case by the Juvenile Court. In this case, those records were made available to the district court, which, in its discretion (see *Watkins* v. *United States*, 343 F. 2d 278 (C.A.D.C.)), turned them over to petitioner's counsel.[23] The records were, therefore, fully disclosed to counsel for whatever use he could make of them in contesting the validity of waiver before trial in the district court.[24]

III

NO REVERSIBLE ERROR WAS COMMITTED DURING PETITIONER'S TRIAL

A. THE TESTIMONY OF FINGERPRINT EXPERTS WAS PROPERLY ADMITTED

The government's proof of petitioner's connection with the offenses charged in the indictment was largely based on latent fingerprints found at the scene of each housebreaking, although one victim identified petitioner as her assailant at the trial. One of these impressions, which matched petitioner's fingerprints taken at the time of a previous arrest (Tr. 9, 92–93), led to his apprehension on the present

[23] We are informed that the district court almost invariably makes the social records available to counsel contesting a Juvenile Court waiver.

[24] Petitioner's contentions that he was improperly treated while in the jurisdiction of the Juvenile Court (Pet. Br. 30–32, 43–44) and that the district court, at a pretrial stage, disparaged his psychiatric proof (Pet. Br. 45–46) raise no substantial questions. No evidence introduced against petitioner at his trial was attributable to interrogation following his arrest. Petitioner erroneously speculates that the hypothetical

charges on September 5, 1961, at which time he was fingerprinted again. At trial, expert witnesses testified, without objection, that the impressions found at the victims' apartments matched those taken after petitioner's 1961 arrest (Tr. 91–92, 111, 206). Petitioner now challenges this testimony on the ground that reference was thereby made to confidential information in Juvenile Court records (Pet. Br. 46–49).

Petitioner not only failed to object to the challenged testimony (Tr. 87, 122, 131, 203), but he stipulated that the 1961 fingerprints might be used for purposes of comparison (Tr. 88, 198, 214). This acquiescence is particularly significant where, as here, the same testimony could have been presented by other means had a timely objection been made. Had petitioner asserted at trial the claim he makes here, government counsel could have asked the expert witnesses to compare the impressions found at the victims' apartments with other fingerprints on file, such as those which may have been routinely taken after petitioner was transferred from Juvenile Court (cf. *Napolitano* v. *United States*, 340 F. 2d 313 (C.A. 1)),

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questions posed to defense psychiatrists were based on admissions made at that time (Pet. Br. 31), but the record discloses that the victims testified to a sequence of events which supported the hypothetical facts (Tr. 33–35, 101, 139). And there is no basis in the record for assuming that the district court did not seriously consider the question whether the Juvenile Court's waiver was proper. The district court had the social records before it, it knew the nature of the charges, and it knew that petitioner had not responded to Juvenile Court treatment. These factors abundantly supported the Juvenile Court's waiver and the district court's refusal to constitute itself a Juvenile Court.

or even with fingerprints taken in open court.[35] Especially where, as here, the failure to object was apparently prompted by a strategic decision to rest solely on proof of insanity (see Tr. 24), we believe it is entirely clear that no "plain error" was committed.

In addition, petitioner's argument is unsound on its merits. Fingerprints taken by police officers upon arresting a juvenile are not records of the Juvenile Court; nor do they constitute information "acquired in the course of the performance of official duties" within the meaning of 11 D.C. Code 929(c). It is clear that the only "official duties" referred to by that section are those of the Juvenile Court—and not those of police officers who arrest a juvenile in carrying out their own official obligations. Indeed, the fact that Congress found it necessary to specify that the term "records" as used in Section 929 "includes notices filed with the court by arresting officers" (11 D.C. Code 929(a)) demonstrates that routine police photographs and fingerprints—which are not "filed with the court"—are not encompassed by the confidentiality provision.

Fingerprinting is part of the routine "booking" process which, in the case of an adult offender, the police may complete before complying with Rule 5(a), Fed. R. Crim. P. See *Mallory* v. *United States*, 354 U.S. 449, 454. There is thus no merit in the suggestion (Pet. Br. 48) that fingerprinting by police renders

[35] It has been uniformly held that fingerprinting, like the taking of a photograph, does not violate the privilege against self-incrimination. See 8 Wigmore, *Evidence*, § 2265, and authorities there cited.

brief detention of a juvenile illegal. Not only is there no support in the record for the assumption that petitioner was fingerprinted during an impermissible delay, but there is indeed no reason to believe that there was any unlawful delay whatever. See opinion of the court below, J.A. 50–51, n. 13.

B. PETITIONER WAS NOT ENTITLED TO A DIRECTED VERDICT ON THE ISSUE OF INSANITY

Petitioner's contention that the government's proof regarding his mental condition at the time of the offenses was insufficient to send the case to the jury (Pet. Br. 49–53) is refuted by the record. The conclusions to which petitioner's experts testified—*i.e.*, that the crimes were products of a mental disease from which petitioner was suffering when he committed the offenses (see Appendix B, pp. 4a–7a, *infra*)—were disputed by two psychiatrists who testified as government witnesses on rebuttal. Dr. Kavanagh concluded that petitioner had not been suffering from any mental disease, and Dr. Owens testified that petitioner did have a mental disease but that the housebreakings and robberies were not the products thereof (App. B, p. 7a, *infra*). See also testimony of Drs. Dobbs and Novak (Appendix B, *infra*, pp. 6a–7a). The court of appeals correctly held that this left the case "in the precise posture which calls for submission of the issue to the jury" (J.A. 57).

There is no merit to the challenges petitioner now makes to the conclusions of the government experts. Dr. Kavanagh's statement on cross-examination that

petitioner was not "a normal individual" (Tr. 704) related to his conclusion that petitioner suffered from a personality disorder which did not, in his view, amount to a mental disease. The other testimony quoted by petitioner (Pet. Br. 50) was to the same effect. Hence Dr. Kavanagh's conclusion that the offenses were not products of any mental disease or defect (which is the governing test in the District of Columbia) was not affected by his cross-examination. And the hypothetical questions posed to Dr. Owens were based on the victims' testimony that, in each instance, the offender committed the robbery before he attempted the rape (Tr. 33–35, 101, 139). Moreover, petitioner did not object to these hypothetical questions on this ground at trial (Tr. 331, 338, 340, 364, 367, 368, 468, 485, 489, 501, 549, 555, 649), and should not now be heard to assert that an insufficient evidentiary foundation was laid to support them. On the basis of this testimony, the jury was justified in concluding that the housebreakings and robberies were not products of any mental disease, but that the rapes were caused by petitioner's mental disorder. This verdict was most consistent with Dr. Owens' conclusions, and it was within the jury's province to accept his expert view. See *McDonald* v. *United States*, 312 F. 2d 847 (C.A.D.C.).

G. THE COURT'S INSTRUCTIONS TO THE JURY WERE NOT COERCIVE

Petitioner's final argument is that the district judge's concluding instructions to the jury improperly coerced individual jurors into agreeing upon a compromise verdict (Pet. Br. 54–56). An examination of

the challenged instructions (pp. 12–13, *supra*), we submit, discloses that they are not coercive in any respect. In the course of these remarks the judge stated on three occasions that each juror was to arrive at an individual verdict, and it was only after making that proposition entirely clear that he suggested that the issues be considered "with a proper regard and deference to the opinions of each other" and that jurors in a "pronounced minority" on any one issue ask themselves why their views were not shared by "a great number of other jurors who are equally honest and equally intelligent * * *" (Tr. 815–816). This was a proper instruction on the attitude with which individual jurors were to approach the issues in the case.

The added statement that "[i]t is your duty to decide this case if you can conscientiously do so" was not an instruction to compromise. It was clear from that statement, both in isolation and in context, that the "duty to decide" existed only if decision could be made consistently with conscientiously held individual views. Thus, this remark is wholly unlike the statement held impermissibly coercive in *Jenkins* v. *United States,* 380 U.S. 445.

Moreover, unlike the charge in *Jenkins* or that in *Allen* v. *United States,* 164 U.S. 492, the challenged remarks were not made to a deadlocked panel, but were included in the general charge before the jury first retired. This is obviously a significant difference. Jurors who find themselves in a minority after substantial deliberation might arguably be coerced to surrender individual views if an implication to that

effect in a judge's statement is added to the majority's pressures. But when the jury has not yet begun its deliberations, instructions of the sort involved here merely promote a desirable attitude of open-mindedness. Similarly, an instruction suggesting that a verdict must be reached might be coercive if given to a deadlocked jury; it is far less so if announced to a jury which is first retiring.

In any event, if petitioner thought it necessary to erase any suggestion of coercion before the jury retired, he should have asserted an objection and proposed a supplementary clarifying instruction. Instead of doing so, he approved the court's charge, possibly because he believed that its effect would be favorable to him. In light of this acquiescence, the present claim should be foreclosed. Rule 30, Fed. R. Crim. P.

No separate contention has been made by petitioner with respect to his sentence, but we believe that the matter deserves mention. Having been found not guilty of the rape charge by reason of insanity pursuant to his assertion of that defense, petitioner was subject to mandatory commitment under 24 D.C. Code 301(d). See *Lynch* v. *Overholser,* 369 U.S. 705. Petitioner's counsel stated at the sentencing proceedings that petitioner was so mentally ill that he might be required to remain in St. Elizabeths Hospital "for the rest of his life" (Tr. 826). He suggested that any sentence on the six housebreaking and robbery counts run concurrently with petitioner's hospital commit-

ment so that "maybe in 30 years, maybe in 40 years * * * when he is free in the eyes of the hospital" he would not be subject to a prison term (Tr. 827). Government counsel was not asked to recommend any sentence, and none was recommended. The district judge imposed consecutive sentences of five to fifteen years on each of the six counts on which petitioner had been found guilty (for a total sentence of thirty to ninety years) with provision that petitioner should be credited with the time spent in a mental institution.

We recognize that the sentence is a very heavy one, even in light of the information before the court tending to show that petitioner had been involved in other criminal activity besides that alleged in the indictment. The practical consequences of the lengthy sentence are not of course predictable since we do not know for how long a period petitioner will require hospitalization and treatment. If he should be able to establish that his recovery has been more rapid than anticipated and that the sentence is too drastic in light of subsequent events, he may move for reduction of sentence under Rule 35, Fed. R. Crim. P., within 60 days after a final order of affirmance. Also, petitioner is not without a remedy if he recovers his sanity several years after affirmance of his conviction. Under 24 D.C. Code 201(c), the Board of Parole for the District of Columbia may apply to the court for a reduction of the minimum sentence whenever it determines that a prisoner has been rehabilitated and his immediate release is not incompatible with the welfare of society. This power has

been used sparingly, but it is available and can appropriately be exercised in a situation such as this one.[26]

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment below should be affirmed.

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NOVEMBER 1965.

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[26] We observe also that petitioner is now over the age of twenty-one and cannot, in any event, come under the jurisdiction of the Juvenile Court. See 11 D.C. Code 1551(b) (Supp. IV, 1965). If this Court were to reverse the instant conviction for the reason that the procedures followed by the Juvenile Court in waiving jurisdiction were impermissible, it is questionable whether the case could be returned to that court for it to determine the relevant issues under proper procedures. Since he is now over twenty-one, petitioner may hereafter be tried on the charges involved in the present indictment only in the district court. The validity of the indictment entered in 1961 turns, however, on the lawfulness of the waiver. If the waiver was void, petitioner will probably have to be reindicted. A new indictment on the housbreaking and robbery charges will, presumably, have to be based upon the special provision in 18 U.S.C. 3288 permitting reindictment where the defect in the former indictment is found after the limitations period has expired.

APPENDIX A

NOVEMBER 30, 1959.

JUVENILE COURT OF THE DISTRICT OF COLUMBIA

POLICY MEMORANDUM NO. 7

To: All Staff.
From: Judge Ketcham.
Subject: Waiver of Jurisdiction.

The authority of the Judge of the Juvenile Court of the District of Columbia to waive or transfer jurisdiction to the U.S. District Court for the District of Columbia is contained in the Juvenile Court Act (§ 11–914 D.C. Code, 1951 Ed.). This section permits the Judge to waive jurisdiction "after full investigation" in the case of any child "sixteen years of age or older [who is] charged with an offense which would amount to a felony in the case of an adult, or any child charged with an offense which if committed by an adult is punishable by death or life imprisonment".

The statute sets forth no specific standards for the exercise of this important discretionary act, but leaves the formulation of such criteria to the Judge. A knowledge of the Judge's criteria is important to the child, his parents, his attorney, to the judges of the U.S. District Court for the District of Columbia, to the United States Attorney and his assistants, and to the Metropolitan Police Department, as well as to the staff of this court, especially the Juvenile Intake Section.

Therefore, the Judge has consulted with the Chief Judge and other judges of the U.S. District Court for the District of Columbia, with the United States Attorney, with representatives of the Bar, and with other groups concerned and has formulated the following criteria and principles concerning waiver of jurisdiction which are consistent with the basic aims and purpose of the Juvenile Court Act.

An offense falling within the statutory limitations (set forth above) will be waived if it has prosecutive merit and if it is heinous or of an aggravated character, or—even though less serious—if it represents a pattern of repeated offenses which indicate that the juvenile may be beyond rehabilitation under Juvenile Court procedures, or if the public needs the protection afforded by such action.

The determinative factors which will be considered by the Judge in deciding whether the Juvenile Court's jurisdiction over such offenses will be waived are the following:

1. The seriousness of the alleged offense to the community and whether the protection of the community requires waiver.

2. Whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner.

3. Whether the alleged offense was against persons or against property, greater weight being given to offenses against persons especially if personal injury resulted.

4. The prosecutive merit of the complaint, i.e., whether there is evidence upon which a Grand Jury may be expected to return an indictment (to be determined by consultation with the United States Attorney).

5. The desirability of trial and disposition of the entire offense in one court when the juvenile's associates in the alleged offense are adults who will be charged with a crime in the U.S. District Court for the District of Columbia.

6. The sophistication and maturity of the juvenile as determined by consideration of his home, environmental situation, emotional attitude and pattern of living.

7. The record and previous history of the juvenile, including previous contacts with the Youth Aid Division, other law enforcement agencies, juvenile courts in other jurisdictions, prior periods of probation to this Court, or prior commitments to juvenile institutions.

8. The prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile (if he is found to have committed the alleged offense) by the use of procedures, services and facilities currently available to the Juvenile Court.

It will be the responsibility of any officer of the Court's staff assigned to make the investigation of any complaint in which waiver of jurisdiction is being considered to develop fully all available information which may bear upon the criteria and factors set forth above. Although not all such factors will be involved in an individual case, the Judge will consider the relevant factors in a specific case before reaching a conclusion to waive juvenile jurisdiction and transfer the case to the U.S. District Court for the District of Columbia for trial under the adult procedures of that Court.

APPENDIX B

Evidence on the Insanity Issue

LAY TESTIMONY

Mrs. Courtney T. Kent, mother of petitioner, testified as follows: She was separated from petitioner's father when petitioner was two years' old (Tr. 218). Petitioner was afraid of his father (Tr. 219, 227, 228). Petitioner first got in trouble when he was 13 or 14 for taking a purse (Tr. 222–223, 226). Petitioner's behavior was disturbed in that he appeared to be in a trance (Tr. 219–220), he could not control his bowels (Tr. 220), he had cut up some goldfish (Tr. 220), and he had killed his puppy (Tr. 221).

Two aunts who took care of petitioner part of the time give similar testimony as to petitioner's behavior (Tr. 603–606, 608–612). Thomas C. Cope, petitioner's uncle, testified that petitioner would talk to himself, and could not finish small odd jobs (Tr. 243).

PSYCHOLOGICAL TESTIMONY

Katherine Beardsley, a clinical psychologist at St. Elizabeths Hospital who tested petitioner, testified that the results were consistent with a diagnosis of chronic undifferentiated schizophrenia (Tr. 255)—marked by poor ability to control one's emotions and to appraise reality (Tr. 256). She testified that he had this condition in June 1961 and that "but for the mental disease [the offenses] would not have occurred" (Tr. 257).

John Lawrence Endacott, Assistant Chief clinical psychologist in the Mental Hygiene Clinic of the Veterans Administration testified that petitioner had average intellectual ability and was suffering from schizophrenia, undifferentiated type (Tr. 379), with a fifty-fifty chance that the cause was some sort of organic condition (Tr. 380). In his opinion, petitioner's acts were directly the result of his schizophrenic condition (Tr. 380).

John Vincent Kavanagh, a psychiatric social worker, testified that he examined petitioner in the spring of 1961 and found him evasive and not properly aware of his problem at school. At that time, he advised that petitioner be seen by a psychiatrist before being readmitted in the September term (Tr. 439).

Malcolm Meltzer, a clinical psychologist, testified that between June and September 1961, it was highly likely that petitioner was suffering from a mental disease—schizophrenia reaction (Tr. 446), and that it was highly likely his criminal acts were caused by the mental disease (Tr. 447).

Bernard Levy, director of psychological services for D.C. General Hospital, testified that his tests taken at the Receiving Home showed that, in June and September 1961, petitioner was suffering from schizophrenia which was the proximate cause of the alleged crimes (Tr. 563).

PSYCHIATRIC TESTIMONY

Dr. Mauris M. Platkin, a psychiatrist from St. Elizabeths Hospital, testified that petitioner was suffering from a schizophrenic reaction, chronic undifferentiated type (Tr. 300), and was suffering from this mental disease in June and September 1961 (Tr.

300–301). He attributed petitioner's acts to his mental disease (Tr. 304). On cross-examination, on the basis of a hypothetical question founded on the facts with respect to Miss Echols (*supra*, pp. 10–11), the doctor testified that he did not know whether petitioner was irresistibly impelled to enter the apartment—"It doesn't sound to me as though he were * * *" (Tr. 330–331)—but that petitioner most likely was aroused sexually when she dropped the pillow (Tr. 333–334). The doctor concluded (Tr. 345): "I agree he went in there ostensibly to get money but I think his desire to do this was the result of the fact that he has a mental illness".

Dr. William Novak, a psychiatrist at D.C. General Hospital, testified that during June and September 1961, petitioner was suffering from a mental disease—schizophrenia reaction of the undifferentiated type (Tr. 350)—and that the acts charged were products of his mental state (Tr. 352). Although he was unable to arrive at a definite opinion, it seemed to him that petitioner was psychotic at that time (Tr. 358). On the basis of a hypothetical question derived from the Echols incident, the doctor admitted that the activity might indicate design and thoughtful planning to rob (Tr. 364).

Dr. Dorothy S. Dobbs, a staff psychiatrist at St. Elizabeths Hospital, testified that from June through September 1961, petitioner was suffering from schizophrenia reaction, chronic undifferentiated, which is a mental disease (Tr. 474). In her opinion the crimes were a product of this mental disease (Tr. 476), although she thought it difficult to answer whether "but for" the disease, petitioner would have committed these crimes (Tr. 476). She admitted that if the facts showed that the robbery was committed first, she would have no honest opinion as to his prime motive

(Tr. 487). It might show prior planning, and it would also show some appreciation of the fact that the act was wrong (Tr. 487–488). She concluded that "the causation with regard to the robberies is obviously less clear than it is with regard to the alleged sexual offenses themselves" (Tr. 492).

Dr. Warren Charles Johnson, a private psychiatrist, testified that during the period June through September 1961, petitioner was suffering from schizophrenia (Tr. 521), and that the acts charged were products of his mental disease (Tr. 528). Dr. Charles E. Goshen, Associate Professor in the Department of Psychiatry at West Virginia University testified similarly (Tr. 635–642). It was stipulated that Drs. William Hamman and James A. Ryan, psychiatrists, would testify that petitioner was suffering from schizophrenia, undifferentiated type, and that the alleged acts were a direct product of this mental disease (Tr. 600–602).

Dr. David J. Owens, psychiatrist at St. Elizabeths Hospital and the Clinical Director of the Maximum Security Unit, also testified that petitioner was suffering from schizophrenic reaction, chronic undifferentiated type (Tr. 672–673). His view, in the context of a hypothetical question based on the Echols facts, was that the disease did not cause the robbery or housebreaking (Tr. 674). He had no opinion as to whether it caused petitioner to rape the victim (Tr. 674). He gave similar answers to hypothetical questions covering the Palmer and Murphy situations (Tr. 675–676).

Dr. John Richard Kavanagh, a psychiatrist, testified that petitioner did not have any mental disease (Tr. 690) but that he would withdraw to avoid answering questions (Tr. 692). The doctor thought that petitioner's actions, which he had observed, were not indicative of an unsound mind or one who is psychotic (Tr. 692–702).

U.S. GOVERNMENT PRINTING OFFICE: 1968

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 104

MORRIS A. KENT, JR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUPPLEMENTAL BRIEF FOR THE PETITIONER

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SUPPLEMENTAL BRIEF FOR THE PETITIONER

I.

Contrary to respondent's contention, the consequences of the waiver decision by the Juvenile Court are drastic.

As expressed by the U.S. Court of Appeals for the D.C. Circuit, "treatment as a juvenile is not a statutory bounty which can be withdrawn lightly." *Black* v. *United States*, —— F.2d —— (decided December 8, 1965). To the contrary, a decision to waive is "critically important", entailing far-reaching consequences to a child. *Ibid.* Whether the standard of waiver be viewed as requiring procedures consistent with criminal, civil or administrative due process of law, it was not satisfied in the instant case.

The attention of this Court is invited to the fact that the U.S. Court of Appeals for the D.C. Circuit has held "assistance of counsel in the 'critically important' determination of waiver . . . (to be) essential to the proper administration of juvenile proceedings." *Ibid.* Contrary to respondent's contention, it has gone on to recognize, "that counsel in a waiver proceeding has a 'legitimate interest' in inspecting the juvenile's confidential social file." *Ibid.* It has, significantly subsequent to the decision of this case, viewed the activities of petitioner's counsel in Juvenile Court as illustrating "the need for counsel to develop information relevant to waiver: "On the same afternoon that counsel was retained, he met with the child's mother and the Social Service Director of the Juvenile Court for the purpose of making representations against any possible waiver . . . ; he submitted a memorandum on the question of waiver together with a report from a psychiatrist relating to the child's mental condition; he filed motions with the Juvenile Court asking that appellant be hospitalized, that his social service file be disclosed, and that a hearing be held prior to waiver; he arranged for two psychiatrists and a psychologist to examine appellant in the Receiving Home, and submitted reports of their findings." *Ibid.*

What is clear under the holding of the U.S. Court of Appeals in *Black* is that petitioner had a right to be represented by counsel in the waiver proceedings and that at the least his counsel was erroneously denied access to petitioner's social service file.

Once the right to counsel is conceded in waiver proceedings, the question arises as to whether that right can be meaningfully exercised save by disclosure to counsel of

the social service file. Since the Juvenile Court relied on that file in its waiver decision (Respondent's brief, p. 33) it is clear that counsel could not have discharged his duty without a perusal of that file—any more than counsel could have discharged his duty in any trial court without being in attendance at the taking of any testimony.

Clearly the petitioner was without counsel at the preliminary stages of the waiver proceeding—when petitioner —a 16 year old boy and a victim of mental illness—was subjected to intensive police interrogation. Cf. *Escobedo* v. *Illinois*.

Insofar as petitioner was pronounced mentally incompetent to participate in trial proceedings on his first mental examination in District Court (Letter from D.C. General Hospital to District Court) a serious question arises as to whether he was not equally incompetent and hence without assistance of counsel in all stages of the Juvenile Court proceeding involving consideration of his waiver. This question could not have been resolved without a hearing—and a hearing was denied to the petitioner.*

It is equally clear that inherent within the Juvenile Court's waiver was the determination that petitioner could not respond to the treatment facilities at its disposal. The petitioner offered to prove his amenability to such treatment at a hearing. Surely this was a "factual issue on which live examination and cross-examination would have been helpful". (Respondent's brief, p. 34.)

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* Fundamental fairness would have prevented the Juvenile Court from waiving jurisdiction over a seriously disordered child, incapable of appreciating the nature of the proceedings. The most plausible inference is that the Juvenile Court proceeded upon the erroneous presumption of petitioner's mental health. See also Appendices.

The petitioner in sum was denied effective assistance of counsel, access to a social service file, essential to counsel's role, and a hearing at which he could have presented his case against waiver—and in consequence juvenile due process in the proceeding below.

II.

The petitioner was further denied his statutory right of "full investigation" by the Juvenile Court.* The defect is patent. Petitioner was arrested in the afternoon or evening of September 5, 1961, and his counsel met with the Social Service Director of the Juvenile Court in the afternoon of September 6, 1961. Counsel promptly secured a psychiatric examination of petitioner and submitted to the Juvenile Court an affidavit of the psychiatrist attesting that petitioner was a victim of severe psychopathology requiring hospital observation in order to have a complete investigation of the psychological and social factors of his case. Petitioner moved the court for hospitalization, disclosure of the Social Service file, and an opportunity to be heard prior to waiver. But the Juvenile Court waived jurisdiction without formally passing upon the motion, without hearing counsel on the motion, and without affording counsel during any part of the proceedings any audience, formal or informal, in chambers or in court.

Petitioner was therefore denied what a "full investigation" requires—disclosure of the considerations weighing with the court and an opportunity to meet them in an open-minded environment. The process of investigation does not mean that the person to be affected by it is to operate in a vacuum. The procedure may not be necessary. But

* 11 D.C. Code 914 [now 11 D.C. Code 1553 (Supp. IV, 1965)].

in some meaningful way opportunity must be afforded to know the information and considerations upon which action is contemplated, to supply additional information, and to urge countervailing considerations.

The point is exemplified by the action of the Securities and Exchange Commission in the handling of securities' registration statements. "So, to prevent unnecessary hardship, an applicant is informed of what the Commission staff regards as deficiencies in a statement and he is allowed to remedy them by amendment. Informal conferences are held with staff members, individual commissioners, and, on occasion, with the full Commission to discuss the adequacy of the statement or amendments. . . . The most useful procedural devices are those which recognize the seriousness of the decision to institute proceedings, and which insure that it shall be made by competent and fair administrators who will give the registrant every opportunity which time permits to present his views to the staff, and, if necessary, to a commissioner or the Commission." Rep. of Atty. Gen. Com. Admin. Proc., S. Doc. No. 8, 77th Cong., 1st Sess., 40 (1941).*

* The procedure before the National Labor Relations Board, in the conduct of an investigation to determine whether to issue a complaint upon an unfair labor practice charge, is to give all parties an opportunity to supply information to substantiate their positions, and to apprise parties of what are deemed to be deficiencies in their positions so as to afford them an opportunity to persuade, explain, or furnish additional substantiating information. If the Regional Director decides not to issue a complaint, his action is appealable to the General Counsel of the National Labor Relations Board, and a further opportunity is provided at that level, by conference and written communication, to persuade, explain, and furnish further information. Even the discretion of the prosecutor in the initiation of criminal proceedings is subject to constitutional limitations. Thus intentional discrimination in the enforcement of an otherwise valid statute may be proved in bar of prosecution. *People* v. *Harris,* 5 Cal. Rept. 852 (1960).

The illegal police inquisition of the child reinforces the totality of circumstances showing lack of a "full investigation." When petitioner was arrested his custody was under the plenary control of the Juvenile Court. D.C. Code Sec. 11-912 (Supp. VIII, 1960). Despite this plenary control, upon petitioner's arrest in the afternoon or evening of September 5, 1961, the Juvenile Court suffered petitioner's subjection to intensive police interrogation until 10:00 p.m. of that day, and during the next day. To be sure the statements made by the child were not offered in evidence. Nonetheless the inquisitorial procedures levelled at petitioner are likely to have tainted subsequent procedures. No reasonable assurances are at hand that independently of the inclusion impermissible materials in hypothetical questions levelled at expert witnesses, the illegal interrogation of the petitioner may not have uncovered other sources of information and the identity of witnesses by whom the case may have been proved without the statement.

The only fair and legal alternative, where the question of waiver has not yet been resolved in favor of retention of jurisdiction, is for the Juvenile Court either to prohibit police questioning of the child or to permit it only after first informing the child of his right to remain silent and to have counsel. Where, as in this case, the Juvenile Court was actively considering waiver, the child was plainly subjected to an illegal inquisition when at the same time the Juvenile Court suffered police interrogation of the child notwithstanding objection of counsel.

The illegal inquisition of petitioner is relevant to and an element of lack of "full investigation." For "full investigation" "obviously means an inquiry not only into the

facts of the alleged offense but also into the question whether the *parens patriae* plan of procedure is desirable and proper in the particular case." *Pee* v. *United States,* 274 F.2d 556, 559. Suffering illegal police interrogation strongly evidences excessive concentration upon "the facts of the alleged offense" to the substantial exclusion of "the question whether the *parens patriae* plan of procedure is desirable and proper in the particular case." It is another element reinforcing the totality of circumstances showing lack of a "full investigation."

In sum, the Juvenile Court not only failed to discharge the duty incumbent upon it as the guardian of child welfare; it failed also to discharge the duty of rational judicial investigation incumbent upon any court.

III.

Respondent suggests (1) that petitioner has passed the age of twenty-one and that reversal of his conviction would render Juvenile Court disposition of his case "questionable", and (2) if this Court were to reverse because the Juvenile Court failed to accord petitioner due process in waiving jurisdiction of him, that a new indictment will have to be based upon 18 U.S.C. 3288. (Respondent's brief, p. 49.)

In reply to the foregoing contentions of the respondent, the petitioner contends that the Juvenile Court retains its original and exclusive jurisdiction of him because it never legally waived same.* No valid indictment can be returned in the District Court in this case under 18 U.S.C. 3288 because of the absence of a legal waiver by the Juvenile

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* *Johnson* v. *State,* 114 A.2d 1 (N.J. 1955). *People* v. *Oliver,* 134 N.E. 2d 197 (N.Y. 1956).

Court. Surely this section of the Code does not confer jurisdiction.

In any event, the petitioner may be proceeded against in a District of Columbia civil proceeding for commitment of him because of his insanity. See *Lynch* v. *Overholser*, 369 U.S. 705. Whether petitioner should be continued in his present confinement in St. Elizabeths hospital because of his insanity should depend upon further consideration and evaluation of his present mental condition in such a civil proceeding.

Conclusion

By virtue of the foregoing the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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(By appointment of the
U. S. Court of Appeals)

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Of Counsel

APPENDIX 1

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 104

MORRIS A. KENT, JR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

AFFIDAVIT BY PETITIONER'S COUNSEL IN DISTRICT COURT

Mark B. Sandground, being duly sworn according to law, deposes and says:

1. I was Petitioner's counsel in the criminal proceedings in District Court.

2. I sought but was denied a hearing in District Court as to the inadequacies of the Juvenile Court proceedings.

3. The Juvenile Court social record made available to me in District Court showed that Petitioner had at no time been examined or treated by a physician at the behest of the Juvenile Court and further contained no diagnosis whatsoever of his condition.

/s/ MARK B. SANDGROUND
Mark B. Sandground

Sworn and subscribed before me, a notary public for and within the District of Columbia this 7th day of December, 1965.

/s/ STUART T. GREENE
My Commission Expires July 14, 1970

CERTIFICATE OF SERVICE

I certify that a copy of this affidavit has been mailed this 7th day of December, 1965 to the Solicitor General of the United States, Washington, D.C.

/s/ RICHARD ARENS
Richard Arens
Counsel for Petitioner
c/o Catholic University
Law School
1323 18th Street, N. W.
Washington, D. C.

APPENDIX 2

PUBLISHED IN THE EVENING STAR

September 8, 1961

"Two years ago, an evaluation of the teen-ager's personality by a Juvenile Court psychologist resulted in an opinion that the youth's responses to tests did not "reflect any serious psychopathology".

Louis Levathes, Judge Ketcham's legal and executive assistant, said the Kent youth was given a battery of "personality tests" in the court's psychological clinic in October, 1959. Court records reveal that the tests indicated the boy was "a sensitive youngster with good personality resources" but with "poor direction and planning."

Court records also noted that he had grown up, with his mother and sister, in a broken home.

The teen-ager was placed on probation for the first time in April, 1959, after police accused him of four housebreakings and an attempted purse-snatching.

His attitude at the time, court aides disclosed, was straight-forward and apparently penitent.

The youth appeared before Judge Ketcham again on December 7, 1959. He was accused of snatching a woman's pocketbook from an auto seat. Court officials said he admitted the charge.

Excelled in School

On that occasion, the youth's indefinite probation was cancelled and he was placed on probation until his 18th birthday. The court declared that his adjustment, follow-

ing the first offense, had been good and that he had excelled in school.

Three months later, in March, 1960, he was back in court. He had been arrested by police on a disorderly conduct charge after a 19-year-girl reported to police he was peeping in a window of her home.

The charge was not pressed by the court's director of social work, according to Mr. Levathes. Court aides again noted the boy's promising adjustment.

Court records also indicated that he was punctual and regular in his probation report appointments. In addition, it was noted that he had been elected president of his eighth-grade class at junior high, had been elected a school marshall and was named as a Junior Red Cross delegate-alternate.

SUPREME COURT OF THE UNITED STATES

No. 104.—October Term, 1965.

Morris A. Kent, Jr., Petitioner, *v.* United States.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[March 21, 1966.]

Mr. Justice Fortas delivered the opinion of the Court.

This case is here on certiorari to the United States Court of Appeals for the District of Columbia. The facts and the contentions of counsel raise a number of disturbing questions concerning the administration by the police and the Juvenile Court authorities of the District of Columbia laws relating to juveniles. Apart from raising questions as to the adequacy of custodial and treatment facilities and policies, some of which are not within judicial competence, the case presents important challenges to the procedure of the police and Juvenile Court officials upon apprehension of a juvenile suspected of serious offenses. Because we conclude that the Juvenile Court's order waiving jurisdiction of petitioner was entered without compliance with required procedures, we remand the case to the trial court.

Morris A. Kent, Jr., first came under the authority of the Juvenile Court of the District of Columbia in 1959. He was then aged 14. He was apprehended as a result of several housebreakings and an attempted purse snatching. He was placed on probation, in the custody of his mother who had been separated from her husband since Kent was two years old. Juvenile Court officials interviewed Kent from time to time during the probation period and accumulated a "Social Service" file.

On September 2, 1961, an intruder entered the apartment of a woman in the District of Columbia. He took her wallet. He raped her. The police found in the apartment latent fingerprints. They were developed and processed. They matched the fingerprints of Morris Kent, taken when he was 14 years old and under the jurisdiction of the Juvenile Court. At about 3 p. m. on September 5, 1961, Kent was taken into custody by the police. Kent was then 16 and therefore subject to the "exclusive jurisdiction" of the Juvenile Court. D. C. Code § 11–907 (1961), now § 11–1551 (Supp. IV, 1965). He was still on probation to that court as a result of the 1959 proceedings.

Upon being apprehended, Kent was taken to police headquarters where he was interrogated by police officers. It appears that he admitted his involvement in the offense which led to his apprehension and volunteered information as to similar offenses involving housebreaking, robbery, and rape. His interrogation proceeded from about 3 p. m. to 10 p. m. the same evening.[1]

Some time after 10 p. m. petitioner was taken to the Receiving Home for Children. The next morning he was released to the police for further interrogation at police headquarters, which lasted until 5 p. m.[2]

[1] There is no indication in the file that the police complied with the requirement of the District Code that a child taken into custody, unless released to his parent, guardian or custodian, "shall be placed in the custody of a probation officer or other person designated by the court, or taken immediately to the court or to a place of detention provided by the Board of Public Welfare, and the officer taking him shall immediately notify the court and shall file a petition when directed to do so by the court." D. C. Code § 11–912 (1961), now § 16–2306 (Supp. IV, 1965).

[2] The elicited statements were not used in the subsequent trial before the United States District Court. Since the statements were made while petitioner was subject to the jurisdiction of the Juvenile Court, they were inadmissible in a subsequent criminal prosecution

The record does not show when his mother became aware that the boy was in custody, but shortly after 2 p. m. on September 6, 1961, the day following petitioner's apprehension, she retained counsel.

Counsel, together with petitioner's mother, promptly conferred with the Social Service Director of the Juvenile Court. In a brief interview, they discussed the possibility that the Juvenile Court might waive jurisdiction under D. C. Code § 11–914 (1961), now § 11–1553 (Supp. IV, 1965) and remit Kent to trial by the District Court. Counsel made known his intention to oppose waiver.

Petitioner was detained at the Receiving Home for almost a week. There was no arraignment during this time, no determination by a judicial officer of probable cause for petitioner's apprehension.[3]

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under the rule of *Harling* v. *United States*, 295 F. 2d 161 (C. A. D. C. Cir. 1961).

[3] In the case of adults, arraignment before a magistrate for determination of probable cause and advice to the arrested person as to his rights, etc., are provided by law and are regarded as fundamental. Cf. Fed. Rules Crim. Proc. 5 (a)(b); *Mallory* v. *United States*, 354 U. S. 449. In *Harling* v. *United States*, *supra*, the Court of Appeals for the District of Columbia has stated the basis for this distinction between juveniles and adults as follows:

"It is, of course, because children are, generally speaking, exempt from criminal penalties that safeguards of the criminal law, such as Rule 5 and the exclusionary *Mallory* rule, have no application in juvenile proceedings." 295 F. 2d, at 163.

In *Edwards* v. *United States*, 330 F. 2d 849, 850 (C. A. D. C. Cir. 1964) it was said that: ". . . special practices . . . follow the apprehension of a juvenile. He may be held in custody by the juvenile authorities—and is available to investigating officers—for five days before any formal action need be taken. There is no duty to take him before a magistrate, and no responsibility to inform him of his rights. He is not booked. The statutory intent is to establish a non-punitive, non-criminal atmosphere."

We indicate no view as to the legality of these practices. Cf. *Harling* v. *United States*, *supra*, 295 F. 2d, at 163, n. 12.

During this period of detention and interrogation, petitioner's counsel arranged for examination of petitioner by two psychiatrists and a psychologist. He thereafter filed with the Juvenile Court a motion for a hearing on the question of waiver of Juvenile Court jurisdiction, together with an affidavit of a psychiatrist certifying that petitioner "is a victim of severe psychopathology" and recommending hospitalization for psychiatric observation. Petitioner's counsel, in support of his motion to the effect that the Juvenile Court should retain jurisdiction of petitioner, offered to prove that if petitioner were given adequate treatment in a hospital under the aegis of the Juvenile Court, he would be a suitable subject for rehabilitation.

At the same time, petitioner's counsel moved that the Juvenile Court should give him access to the Social Service file relating to petitioner which had been accumulated by the staff of the Juvenile Court during petitioner's probation period, and which would be available to the Juvenile Court judge in considering the question whether it should retain or waive jurisdiction. Petitioner's counsel represented that access to this file was essential to his providing petitioner with effective assistance of counsel.

The Juvenile Court judge did not rule on these motions. He held no hearing. He did not confer with petitioner or petitioner's parents or petitioner's counsel. He entered an order reciting that after "full investigation, I do hereby waive" jurisdiction of petitioner and directing that he be "held for trial for [the alleged] offenses under the regular procedure of the U. S. District Court for the District of Columbia." He made no findings. He did not recite any reason for the waiver.[4] He

[4] At the time of these events, there was in effect Policy Memorandum No. 7 of November 30, 1959, promulgated by the judge of the Juvenile Court to set forth the criteria to govern disposition

made no reference to the motions filed by petitioner's counsel. We must assume that he denied, *sub silentio*, the motions for a hearing, the recommendation for hospitalization for psychiatric observation, the request for access to the Social Service file, and the offer to prove that petitioner was a fit subject for rehabilitation under the Juvenile Court's jurisdiction.[5]

Presumably, prior to entry of his order, the Juvenile Court judge received and considered recommendations of the Juvenile Court staff, the Social Service file relating to petitioner, and a report dated September 8, 1961 (three days following petitioner's apprehension), submitted to him by the Juvenile Probation Section. The Social Service file and the September 8 report were later sent to the District Court and it appears that both of them referred to petitioner's mental condition. The September 8 report spoke of "a rapid deterioration of [petitioner's] personality structure and the possibility of mental illness." As stated, neither this report nor the Social Service file was made available to petitioner's counsel.

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of waiver requests. It is set forth in the Appendix. This Memorandum has since been rescinded. See *United States* v. *Caviness*, 239 F. Supp. 545, 550 (D. D. C. Cir. 1965).

[5] It should be noted that at this time the statute provided for only one Juvenile Court judge. Congressional hearings and reports attest the impossibility of the burden which he was supposed to carry. See Amending the Juvenile Court Act of the District of Columbia, Hearings before Subcommittee No. 3 of the House Committee on the District of Columbia, 87th Cong., 1st Sess. (1961); Juvenile Delinquency, Hearings before the Subcommittee to Investigate Juvenile Delinquency of the Senate Committee on the Judiciary, 86th Cong., 1st Sess. (1960); Additional Judges for Juvenile Court, Hearing before the House Committee on the District of Columbia, 86th Cong., 1st Sess. (1959); H. R. Rep. No. 1041, 87th Cong., 1st Sess. (1961); S. Rep. No. 841, 87th Cong., 1st Sess. (1961); S. Rep. No. 116, 86th Cong., 1st Sess. (1959). The statute was amended in 1962 to provide for three judges for the court. 76 Stat. 21; D. C. Code § 11–1502 (Supp. IV, 1965).

The provision of the Juvenile Court Act governing waiver expressly provides only for "full investigation." It states the circumstances in which jurisdiction may be waived and the child held for trial under adult procedures, but it does not state standards to govern the Juvenile Court's decision as to waiver. The provision reads as follows:

> "If a child sixteen years of age or older is charged with an offense which would amount to a felony in the case of an adult, or any child charged with an offense which if committed by an adult is punishable by death or life imprisonment, the judge may, after full investigation, waive jurisdiction and order such child held for trial under the regular procedure of the court which would have jurisdiction of such offense if committed by an adult; or such other court may exercise the powers conferred upon the juvenile court in this subchapter in conducting and disposing of such cases." [6]

Petitioner appealed from the Juvenile Court's waiver order to the Municipal Court of Appeals, which affirmed, and also applied to the United States District Court for a writ of habeas corpus, which was denied. On appeal from these judgments, the United States Court of Appeals held on January 22, 1963, that neither appeal to the Municipal Court of Appeals nor habeas corpus was available. In the Court of Appeals' view, the exclusive method of reviewing the Juvenile Court's waiver order was a motion to dismiss the indictment in the District Court. *Kent* v. *Reid*, 316 F. 2d 331 (C. A. D. C. Cir. 1963).

Meanwhile, on September 25, 1961, shortly after the Juvenile Court order waiving its jurisdiction, petitioner was indicted by a grand jury of the United States Dis-

[6] D. C. Code § 11–914 (1961), now § 11–1553 (Supp. IV, 1965).

trict Court for the District of Columbia. The indictment contained eight counts alleging two instances of housebreaking, robbery, and rape, and one of housebreaking and robbery. On November 16, 1961, petitioner moved the District Court to dismiss the indictment on the grounds that the waiver was invalid. He also moved the District Court to constitute itself a Juvenile Court as authorized by D. C. Code § 11–914 (1961), now § 11–1553 (Supp. IV, 1965). After substantial delay occasioned by petitioner's appeal and habeas corpus proceedings, the District Court addressed itself to the motion to dismiss on February 8, 1963.[7]

The District Court denied the motion to dismiss the indictment. The District Court ruled that it would not "go behind" the Juvenile Court judge's recital that his order was entered "after full investigation." It held that "The only matter before me is as to whether or not the statutory provisions were complied with and the Courts have held . . . with reference to full investigation, that that does not mean a quasi judicial or judicial proceeding. No hearing is required."

On March 7, 1963, the District Court held a hearing on petitioner's motion to determine his competency to stand trial. The court determined that petitioner was competent.[8]

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[7] On February 5, 1963, the motion to the District Court to constitute itself a Juvenile Court was denied. The motion was renewed orally and denied on February 8, 1963, after the District Court's decision that the indictment should not be dismissed.

[8] The District Court had before it extensive information as to petitioner's mental condition, bearing upon both competence to stand trial and the defense of insanity. The court had obtained the "Social Service" file from the Juvenile Court and had made it available to petitioner's counsel. On October 13, 1961, the District Court had granted petitioner's motion of October 6 for commitment to the Psychiatric Division of the General Hospital for 60 days. On December 20, 1961, the hospital reported that "It is the con-

At trial, petitioner's defense was wholly directed toward proving that he was not criminally responsible because "his unlawful act was the product of mental disease or defect." *Durham* v. *United States*, 214 F. 2d 862, 875 (C. A. D. C. Cir. 1954). Extensive evidence, including expert testimony, was presented to support this defense. The jury found as to the counts alleging rape that petitioner was "not guilty by reason of insanity." Under District of Columbia law, this made it mandatory that petitioner be transferred to St. Elizabeths Hospital, a mental institution, until his sanity is restored.[9] On the six counts of housebreaking and robbery, the jury found that petitioner was guilty.[10]

Kent was sentenced to serve five to 15 years on each count as to which he was found guilty, or a total of 30

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census [*sic*] of the staff that Morris is emotionally ill and severely so . . . we feel that he is incompetent to stand trial and to participate in a mature way in his own defense. His illness has interfered with his judgment and reasoning ability . . . ." The prosecutor opposed a finding of incompetence to stand trial, and at the prosecutor's request, the District Court referred petitioner to St. Elizabeths Hospital for psychiatric observation. According to a letter from the Superintendent of St. Elizabeths of April 5, 1962, the hospital's staff found that petitioner was "suffering from mental disease at the present time, Schizophrenia Reaction, Chronic Undifferentiated Type," that he had been suffering from this disease at the time of the charged offenses, and that "if committed by him [those criminal acts] were the product of this disease." They stated, however, that petitioner was "mentally competent to understand the nature of the proceedings against him and to consult properly with counsel in his own defense."

[9] D. C. Code § 24–301 (1961).

[10] The basis for this distinction—that petitioner was "sane" for purposes of the housebreaking and robbery but "insane" for the purposes of the rape—apparently was the hypothesis, for which there is some support in the record, that the jury might find that the robberies had anteceded the rapes, and in that event, it might conclude that the housebreaking and robberies were not the products of his mental disease or defect, while the rapes were produced thereby.

to 90 years in prison. The District Court ordered that the time to be spent at St. Elizabeths on the mandatory commitment after the insanity acquittal be counted as part of the 30- to 90-year sentence. Petitioner appealed to the United States Court of Appeals for the District of Columbia Circuit. That court affirmed. 343 F. 2d 247 (C. A. D. C. Cir. 1964).[11]

Before the Court of Appeals and in this Court, petitioner has urged a number of grounds for reversal. He argues that petitioner's detention and interrogation, described above, were unlawful. He contends that the police failed to follow the procedure prescribed by the Juvenile Court Act in that they failed to notify the parents of the child and the Juvenile Court itself, note 1, *supra;* that petitioner was deprived of his liberty for about a week without a determination of probable cause which would have been required in the case of an adult, see note 3, *supra;* that he was interrogated by the police in the absence of counsel or a parent, cf. *Harling* v. *United States,* 295 F. 2d 161, 163, n. 12 (C. A. D. C. Cir. 1961), without warning of his right to remain silent or advice as to his right to counsel, in asserted violation of the Juvenile Court Act and in violation of rights that he would have if he were an adult; and that petitioner was fingerprinted in violation of the asserted intent of the Juvenile Court Act and while unlawfully detained and that the fingerprints were unlawfully used in the District Court proceeding.[12]

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[11] Petitioner filed a petition for rehearing *en banc,* but subsequently moved to withdraw the petition in order to prosecute his petition for certiorari to this Court. The Court of Appeals permitted withdrawal. Chief Judge Bazelon filed a dissenting opinion in which Circuit Judge Wright joined. 343 F. 2d 264 (C. A. D. C. Cir. 1965).

[12] Cf. *Harling* v. *United States,* 295 F. 2d 161 (C. A. D. C. Cir. 1961); *Bynum* v. *United States,* 262 F. 2d 465 (C. A. D. C. Cir. 1958). It is not clear from the record whether the fingerprints used

These contentions raise problems of substantial concern as to the construction of and compliance with the Juvenile Court Act. They also suggest basic issues as to the justifiability of affording a juvenile less protection than is accorded to adults suspected of criminal offenses, particularly where, as here, there is an absence of any indication that the denial of rights available to adults was offset, mitigated or explained by action of the Government, as *parens patriae,* evidencing the special solicitude for juveniles commanded by the Juvenile Court Act. However, because we remand the case on account of the procedural error with respect to waiver of jurisdiction, we do not pass upon these questions.[13]

It is to petitioner's arguments as to the infirmity of the proceedings by which the Juvenile Court waived its otherwise exclusive jurisdiction that we address our attention. Petitioner attacks the waiver of jurisdiction on a number of statutory and constitutional grounds. He contends that the waiver is defective because no hearing was held; because no findings were made by the Juvenile Court; because the Juvenile Court stated no

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were taken during the detention period or were those taken while petitioner was in custody in 1959, nor is it clear that petitioner's counsel objected to the use of the fingerprints.

[13] Petitioner also urges that the District Court erred in the following respects:

(1) It gave the jury a version of the "Allen" charge. See *Allen* v. *United States,* 164 U. S. 492.

(2) It failed to give an adequate and fair competency hearing.

(3) It denied the motion to constitute itself a juvenile court pursuant to D. C. Code § 11–914 (1961), now § 11–1553. (Supp. IV, 1965.)

(4) It should have granted petitioner's motion for acquittal on all counts, *n. o. v.,* on the grounds of insanity.

We decide none of these claims.

reasons for waiver; and because counsel was denied access to the Social Service file which presumably was considered by the Juvenile Court in determining to waive jurisdiction.

We agree that the order of the Juvenile Court waiving its jurisdiction and transferring petition for trial in the United States District Court for the District of Columbia was invalid. There is no question that the order is reviewable on motion to dismiss the indictment in the District Court, as specified by the Court of Appeals in this case. *Kent* v. *Reid, supra.* The issue is the standards to be applied upon such review.

We agree with the Court of Appeals that the statute contemplates that the Juvenile Court should have considerable latitude within which to determine whether it should retain jurisdiction over a child or—subject to the statutory delimitation [14]—should waive jurisdiction. But this latitude is not complete. At the outset, it assumes procedural regularity sufficient in the particular circumstances to satisfy the basic requirements of due process and fairness, as well as compliance with the statutory requirement of a "full investigation." *Green* v. *United States,* 308 F. 2d 303 (C. A. D. C. Cir. 1962).[15] The statute gives the Juvenile Court a substantial degree of discretion as to the factual considerations to be considered, the weight to be given them and the conclusion to be

[14] The statute is set out at pp. 5–6, *supra.*

[15] "What is required before a waiver is, as we have said, 'full investigation' . . . . It prevents the waiver of jurisdiction as a matter of routine for the purpose of easing the docket. It prevents routine waiver in certain classes of alleged crimes. It requires a judgment in each case based on 'an inquiry not only into the facts of the alleged offense but also into the question whether the *parens patriae* plan of procedure is desirable and proper in the particular case.' *Pee* v. *United States,* 107 U. S. App. D. C. 47, 50; 274 F. 2d 556, 559 (1959)." *Green* v. *United States, supra,* at 305.

reached. It does not confer upon the Juvenile Court a license for arbitrary procedure. The statute does not permit the Juvenile Court to determine in isolation and without the participation or any representation of the child the "critically important" question whether a child will be deprived of the special protections and provisions of the Juvenile Court Act.[16] It does not authorize the Juvenile Court, in total disregard of a motion for hearing filed by counsel, and without any hearing or statement or reasons, to decide—as in this case—that the child will be taken from the Receiving Home for Children and transferred to jail along with adults; and that he will be exposed to the possibility of a death sentence[17] instead of treatment for a maximum, in Kent's case, of five years, until he is 21.[18]

We do not consider whether, on the merits, Kent should have been transferred; but there is no place in our system of law for reaching a result of such tremendous consequences without ceremony—without hearing, without effective assistance of counsel, without a statement of reasons. It is inconceivable that a court of justice dealing with adults, with respect to a similar issue, would proceed in this manner. It would be extraordinary if society's special concern for children, as reflected in the District of Columbia's Juvenile Court Act, permitted this procedure. We hold that it does not.

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[16] See *Watkins* v. *United States*, 343 F. 2d 278, 282 (C. A. D. C. Cir. 1964); *Black* v. *United States*, — F. 2d — (C. A. D. C. Cir. 1965).

[17] D. C. Code § 22–2801 (1961) fixes the punishment for rape at 30 years, or death if the jury so provides in its verdict. The maximum punishment for housebreaking is 15 years, D. C. Code § 22–1801 (1961); for robbery it is also 15 years, D. C. Code § 22–2901 (1961).

[18] The jurisdiction of the Juvenile Court over a child ceases when he becomes 21. D. C. Code § 11–907 (1961), now § 11–1551 (Supp. IV, 1965).

1. The theory of the District's Juvenile Court Act, like that of other jurisdictions,[19] is rooted in social welfare philosophy rather than in the *corpus juris*. Its proceedings are designated as civil rather than criminal. The Juvenile Court is theoretically engaged in determining the needs of the child and of society rather than adjudicating criminal conduct. The objectives are to provide measures of guidance and rehabilitation for the child and protection for society, not to fix criminal responsibility, guilt and punishment. The State is *parens patriae* rather than prosecuting attorney and judge.[20] But the admonition to function in a "parental" relationship is not an invitation to procedural arbitrariness.

2. Because the State is supposed to proceed in respect of the child proceeding as *parens patriae* and not as adversary, courts have relied on the premise that the proceedings are "civil" in nature and not criminal, and have asserted that the child cannot complain of the deprivation of important rights available in criminal cases. It has been asserted that he can claim only the fundamental due process right to fair treatment.[21] For example, it has been held that he is not entitled to bail; to indictment by grand jury; to a speedy and public trial; to trial by jury; to immunity against self-incrimination; to confrontation of his accusers; and in some jurisdictions (but not in the District of Columbia, see *Shioutakon* v. *District of Columbia*, 236 F. 2d 666 (C. A.

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[19] All States have juvenile court systems. A study of the actual operation of these systems is contained in Note, Juvenile Delinquents: The Police, State Courts, and Individualized Justice, 79 Harv. L. Rev. 775 (1966).

[20] See Handler, The Juvenile Court and the Adversary System, 1965 Wis. L. Rev. 7.

[21] *Pee* v. *United States*, 274 F. 2d 556 (C. A. D. C. Cir. 1959).

D. C. Cir. 1956), and *Black* v. *United States, supra*) that he is not entitled to counsel.[22]

While there can be no doubt of the original laudable purpose of juvenile courts, studies and critiques in recent years raise serious questions as to whether actual performance measures well enough against theoretical purpose to make tolerable the immunity of the process from the reach of constitutional guaranties applicable to adults.[23] There is much evidence that some juvenile courts, including that of the District of Columbia, lack the personnel, facilities and techniques to perform adequately as representatives of the State in a *parens patriae* capacity, at least with respect to children charged with law violation. There is evidence, in fact, that there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children.[24]

This concern, however, does not induce us in this case to accept the invitation [25] to rule that constitutional guaranties which would be applicable to adults charged with the serious offenses for which Kent was tried must be applied in juvenile court proceedings concerned with allegations of law violation. The Juvenile Court Act and the decisions of the United States Court of Appeals for the District of Columbia provide an adequate basis for decision of this case, and we go no further.

3. It is clear beyond dispute that the waiver of jurisdiction is a "critically important" action determining

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[22] See *Pee* v. *United States, supra,* at 563; Paulsen, Fairness to the Juvenile Offender, 41 Minn. L. Rev. 547 (1957).

[23] Cf. *Harling* v. *United States,* 295 F. 2d 161, 164 (C. A. D. C. Cir. 1961).

[24] See Handler, *op. cit. supra,* note 15; Note, *supra,* note 19; materials cited in note 5, *supra.*

[25] See Brief of *Amicus Curiae.*

vitally important statutory rights of the juvenile. The Court of Appeals for the District of Columbia has so held. See *Black* v. *United States, supra; Watkins* v. *United States,* 343 F. 2d 278 (C. A. D. C. Cir. 1964). The statutory scheme makes this plain. The Juvenile Court is vested with "original and exclusive jurisdiction" of the child. This jurisdiction confers special rights and immunities. He is, as specified by the statute, shielded from publicity. He may be confined, but with rare exceptions he may not be jailed along with adults. He may be detained, but only until he is 21 years of age. The court is admonished by the statute to give preference to retaining the child in the custody of his parents "unless his welfare and the safety and protection of the public cannot be adequately safeguarded without . . . removal." The child is protected against consequences of adult conviction such as the loss of civil rights, the use of adjudication against him in subsequent proceedings, and disqualification for public employment. D. C. Code §§ 11–907, 11–915, 11–927, 11–929 (1961).[26]

The net, therefore, is that petitioner—a boy of 16—was by statute entitled to certain procedures and benefits as a consequence of his statutory right to the "exclusive" jurisdiction of the Juvenile Court. In these circumstances, considering particularly that decision as to waiver of jurisdiction and transfer of the matter to the District Court was potentially as important to petitioner as the difference between five years' confinement and a death sentence, we conclude that, as a condition to a valid waiver order, petitioner was entitled to a hearing, including access by his counsel to the social records and probation or similar reports which presumably are considered by the court, and to a statement of reasons for

[26] These are now, without substantial changes, §§ 11–1551, 16–2307, 16–2308, 16–233, 11–1589 (Supp. IV, 1965).

the Juvenile Court's decision. We believe that this result is required by the statute read in the context of constitutional principles relating to due process and the assistance of counsel.[27]

The Court of Appeals in this case relied upon *Wilhite* v. *United States*, 281 F. 2d 642 (C. A. D. C. Cir. 1960). In that case, the Court of Appeals held, for purposes of a determination as to waiver of jurisdiction, that no formal hearing is required and that the "full investigation" required of the Juvenile Court need only be such "as is needed to satisfy *that* court on the question of waiver." [28] (Emphasis supplied.) The authority of *Wilhite*, however, is substantially undermined by other, more recent, decisions of the Court of Appeals.

In *Black* v. *United States*, decided by the Court of Appeals on December 8, 1965, the court [29] held that assistance of counsel in the "critically important" determination of waiver is essential to the proper administration of juvenile proceedings. Because the juvenile was not advised of his right to retained or appointed counsel, the judgment of the District Court, following waiver of jurisdiction by the Juvenile Court, was reversed. The court relied upon its decision in *Shioutakon* v. *District*

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[27] While we "will not ordinarily review decisions of the United States Court of Appeals [for the District of Columbia Circuit] which are based upon statutes . . . limited [to the District]. . . . ," *Del Vecchio* v. *Bowers*, 296 U. S. 280, 285, the position of that court, as we discuss *infra*, is self-contradictory. Nor have we deferred to decisions on local law where to do so would require adjudication of difficult constitutional questions. See *District of Columbia* v. *Little*, 339 U. S. 1.

[28] The panel was composed of Circuit Judges Miller, Fahy and Burger. Judge Fahy concurred in the result. It appears that the attack on the regularity of the waiver of jurisdiction was made 17 years after the event, and that no objection to waiver had been made in the District Court.

[29] Bazelon, C. J., Fahy and Leventhal, JJ.

of Columbia, 236 F. 2d 666 (C. A. D. C. Cir. 1956), in which it had held that effective assistance of counsel in juvenile court proceedings is essential. See also *McDaniel* v. *Shea*, 278 F. 2d 460 (C. A. D. C. Cir. 1960). In *Black*, the court referred to the Criminal Justice Act, enacted four years after *Shioutakon*, in which Congress provided for the assistance of counsel "in proceedings before the Juvenile Court of the District of Columbia." D. C. Code § 2–2202 (1961). The court held that "The need is even greater in the adjudication of waiver [than in a case like *Shioutakon*] since it contemplates the imposition of criminal sanctions." — F. 2d, at —.

In *Watkins* v. *United States*, 343 F. 2d 278 (C. A. D. C. Cir. 1964), decided in November 1964, the Juvenile Court had waived jurisdiction of appellant who was charged with housebreaking and larceny. In the District Court, appellant sought disclosure of the social record in order to attack the validity of the waiver. The Court of Appeals held that in a waiver proceeding a juvenile's attorney is entitled to access to such records. The court observed that

> "All of the social records concerning the child are usually relevant to waiver since the Juvenile Court must be deemed to consider the entire history of the child in determining waiver. The relevance of particular items must be construed generously. Since an attorney has no certain knowledge of what the social records contain, he cannot be expected to demonstrate the relevance of particular items in his request.
>
> "The child's attorney must be advised of the information upon which the Juvenile Court relied in order to assist effectively in the determination of the waiver question, by insisting upon the statutory command that waiver can be ordered only after 'full

investigation,' and by guarding against action of the Juvenile Court beyond its discretionary authority."

The court remanded the record to the District Court for a determination of the extent to which the records should be disclosed.

The Court of Appeals' decision in the present case was handed down on October 26, 1964, prior to its decisions in *Black* and *Watkins*. The Court of Appeals assumed that since petitioner had been a probationer of the Juvenile Court for two years, that court had before it sufficient evidence to make an informed judgment. It therefore concluded that the statutory requirement of a "full investigation" had been met. It noted the absence of "a specification by the Juvenile Court judge of precisely why he concluded to waive jurisdiction." 343 F. 2d, at 253. While it indicated that "in some cases at least" a useful purpose might be served "by a discussion of the reasons motivating the determination," *id.*, at 253, n. 8, it did not conclude that the absence thereof invalidated the waiver.

As to the denial of access to the social records, the Court of Appeals stated that "the statute is ambiguous." It said that petitioner's claim, in essence, is "that counsel should have the opportunity to challenge them, presumably in a manner akin to cross-examination." *Id.*, at 258, n. 16. It held, however, that this is "the kind of adversarial tactics which the system is designed to avoid." It characterized counsel's proper function as being merely that of bringing forward affirmative information which might help the court. His function, the Court of Appeals said, "is not to denigrate the staff's submissions and recommendations." *Ibid.* Accordingly, it held that the Juvenile Court had not abused its discretion in denying access to the social records.

We are of the opinion that the Court of Appeals misconceived the basic issue and the underlying values in this case. It did note, as another panel of the same court did a few months later in *Black* and *Watkins*, that the determination of whether to transfer a child from the statutory structure of the Juvenile Court to the criminal processes of the District Court is "critically important." We hold that it is, indeed, a "critically important" proceeding. The Juvenile Court Act confers upon the child a right to avail himself of that court's "exclusive" jurisdiction. As the Court of Appeals has said, "It is implicit in [the Juvenile Court] scheme that noncriminal treatment is to be the rule—and the adult criminal treatment, the exception which must be governed by the particular factors of individual cases." *Harling* v. *United States*, 295 F. 2d 161, 164–165 (C. A. D. C. Cir. 1961).

Meaningful review requires that the reviewing court should review. It should not be remitted to assumptions. It must have before it a statement of the reasons motivating the waiver including, of course, a statement of the relevant facts. It may not "assume" that there are adequate reasons, nor may it merely assume that "full investigation" has been made. Accordingly, we hold that it is incumbent upon the Juvenile Court to accompany its waiver order with a statement of the reasons or considerations therefor. We do not read the statute as requiring that this statement must be formal or that it should necessarily include conventional findings of fact. But the statement should be sufficient to demonstrate that the statutory requirement of "full investigation" has been met; and that the question has received the careful consideration of the Juvenile Court; and it must set forth the basis for the order with sufficient specificity to permit meaningful review.

Correspondingly, we conclude that an opportunity for a hearing which may be informal, must be given the child prior to entry of a waiver order. Under *Black*, the child is entitled to counsel in connection with a waiver proceeding, and under *Watkins*, counsel is entitled to see the child's social records. These rights are meaningless—an illusion, a mockery—unless counsel is given an opportunity to function.

The right to representation by counsel is not a formality. It is not a grudging gesture to a ritualistic requirement. It is of the essence of justice. Appointment of counsel without affording an opportunity for hearing on a "critically important" decision is tantamount to denial of counsel. There is no justification for the failure of the Juvenile Court to rule on the motion for hearing filed by petitioner's counsel, and it was error to fail to grant a hearing.

We do not mean by this to indicate that the hearing to be held must conform with all of the requirements of a criminal trial or even of the usual administrative hearing; but we do hold that the hearing must measure up to the essentials of due process and fair treatment. *Pee* v. *United States*, 274 F. 2d 556, 559 (C. A. D. C. Cir. 1959).

With respect to access by the child's counsel to the social records of the child, we deem it obvious that since these are to be considered by the Juvenile Court in making its decisions to waiver, they must be made available to the child's counsel. This is what the Court of Appeals itself held in *Watkins*. There is no doubt as to the statutory basis for this conclusion, as the Court of Appeals pointed out in *Watkins*. We cannot agree with the Court of Appeals in the present case that the statute is "ambiguous." The statute expressly provides that the record shall be withheld from "indiscriminate" public inspection, "except that such records or parts thereof *shall* be made available by rule of court or special order

of court to such persons . . . as have a *legitimate interest* in the protection . . . of the child . . . ." D. C. Code § 11–929 (b) (1961), now § 11–1586 (b) (Supp. IV, 1965). (Emphasis supplied.)[30] The Court of Appeals has held in *Black* and we agree, that counsel must be afforded to the child in waiver proceedings. Counsel, therefore, have a "legitimate interest" in the protection of the child, and must be afforded access to these records.[31]

We do not agree with the Court of Appeals' statement, attempting to justify denial of access to these records, that counsel's role is limited to presenting "to the court anything on behalf of the child which might help the court in arriving at a decision; it is not to denigrate the staff's submissions and recommendations." On the contrary, if the staff's submissions include materials which are susceptible to challenge or impeachment, it is precisely the role of counsel to "denigrate" such matter. There is no irrebuttable presumption of accuracy attached to staff reports. If a decision on waiver is "critically important" it is equally of "critical importance" that the material submitted to the judge—which is protected by the statute only against "indiscriminate" inspection—be subjected, within reasonable limits having regard to the theory of the Juvenile Court Act, to examination, criticism and refutation. While the Juvenile Court judge may, of course, receive *ex parte* analyses

[30] Under the statute, the Juvenile Court has power by rule or order, to subject the examination of the social records to conditions which will prevent misuse of the information. Violation of any such rule or order, or disclosure of the information "except for purposes for which . . . released," is a misdemeanor. D. C. Code § 11–929 (1961), now, without substantial change, § 11–1586 (Supp. IV, 1965).

[31] In *Watkins*, the Court of Appeals seems to have permitted withholding of some portions of the social record from examination by petitioner's counsel. To the extent that *Watkins* is inconsistent with the standard which we state, it cannot be considered as controlling.

and recommendations from his staff, he may not, for purposes of a decision on waiver, receive and rely upon secret information, whether emanating from its staff or otherwise. The Juvenile Court is governed in this respect by the established principles which control courts and quasi-judicial agencies of the Government.

For the reasons stated, we conclude that the Court of Appeals and the District Court erred in sustaining the validity of the waiver by the Juvenile Court. The Government urges that any error committed by the Juvenile Court was cured by the proceedings before the District Court. It is true that the District Court considered and denied a motion to dismiss on the grounds of the invalidity of the waiver order of the Juvenile Court, and that it considered and denied a motion that it should itself, as authorized by statute, proceed in this case to "exercise the powers conferred upon the juvenile court." D. C. Code § 11–914 (1961), now § 11–1553 (Supp. IV, 1965). But we agree with the Court of Appeals in *Black*, that "the waiver question was primarily and initially one for the Juvenile Court to decide and its failure to do so in a valid manner cannot be said to be harmless error. It is the Juvenile Court, not the District Court, which has the facilities, personnel and expertise for a proper determination of the waiver issue." — F. 2d, at —.[32]

Ordinarily we would reverse the Court of Appeals and direct the District Court to remand the case to the Juvenile Court for a new determination of waiver. If on remand the decision were against waiver, the indictment

[32] It also appears that the District Court requested and obtained the Social Service file and the probation staff's report of September 8, 1961, and that these were made available to petitioner's counsel. This did not cure the error of the Juvenile Court. Perhaps the point of it is that it again illustrates the maxim that while non-disclosure may contribute to the comfort of the staff, disclosure does not cause heaven to fall.

in the District Court would be dismissed. See *Black* v. *United States, supra.* However, petitioner has now passed the age of 21 and the Juvenile Court can no longer exercise jurisdiction over him. In view of the unavailability of a redetermination of the waiver question by the Juvenile Court, it is urged by petitioner that the conviction should be vacated and the indictment dismissed. In the circumstances of this case, and in light of the remedy which the Court of Appeals fashioned in *Black, supra,* we do not consider it appropriate to grant this drastic relief.[33] Accordingly, we vacate the order of the Court of Appeals and the judgment of the District Court and remand the case to the District Court for a hearing *de novo* on waiver, consistent with this opinion.[34] If that court finds that waiver was inappropriate, petitioner's conviction must be vacated. If, however, it finds that the waiver order was proper when originally made, the District Court may proceed, after such consideration of such motions as counsel may make and such further proceedings, if any, as may be warranted, and to enter an appropriate judgment. Cf. *Black* v. *United States, supra.*

Reversed and remanded.

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[33] Petitioner is in St. Elizabeths Hospital for psychiatric treatment as a result of the jury verdict on the rape charges.

[34] We do not deem it appropriate merely to vacate the judgment and remand to the Court of Appeals for reconsideration of its present decision in light of its subsequent decisions in *Watkins* and *Black, supra.* Those cases were decided by different panels of the Court of Appeals from that which decided the present case, and in view of our grant of certiorari and of the importance of the issue, we consider it necessary to resolve the question presented instead of leaving it open for further consideration by the Court of Appeals.

APPENDIX.

Policy Memorandum No. 7, November 30, 1959.

The authority of the Judge of the Juvenile Court of the District of Columbia to waive or transfer jurisdiction to the U. S. District Court for the District of Columbia is contained in the Juvenile Court Act (§ 11–914 D. C. Code, 1951 Ed.). This section permits the Judge to waive jurisdiction "after full investigation" in the case of any child "sixteen years of age or older [who is] charged with an offense which would amount to a felony in the case of an adult, or any child charged with an offense which if committed by an adult is punishable by death or life imprisonment."

The statute sets forth no specific standards for the exercise of this important discretionary act, but leaves the formulation of such criteria to the Judge. A knowledge of the Judge's criteria is important to the child, his parents, his attorney, to the judges of the U. S. District Court for the District of Columbia, to the United States Attorney and his assistants, and to the Metropolitan Police Department, as well as to the staff of this court, especially the Juvenile Intake Section.

Therefore, the Judge has consulted with the Chief Judge and other judges of the U. S. District Court for the District of Columbia, with the United States Attorney, with representatives of the Bar, and with other groups concerned and has formulated the following criteria and principles concerning waiver of jurisdiction which are consistent with the basic aims and purposes of the Juvenile Court Act.

An offense falling within the statutory limitations (set forth above) will be waived if it has prosecutive merit and if it is heinous or of an aggravated character, or—even though less serious—if it represents a pattern of

repeated offenses which indicate that the juvenile may be beyond rehabilitation under Juvenile Court procedures, or if the public needs the protection afforded by such action.

The determinative factors which will be considered by the Judge in deciding whether the Juvenile Court's jurisdiction over such offenses will be waived are the following:

1. The seriousness of the alleged offense to the community and whether the protection of the community requires waiver.

2. Whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner.

3. Whether the alleged offense was against persons or against property, greater weight being given to offenses against persons especially if personal injury resulted.

4. The prosecutive merit of the complaint, i. e., whether there is evidence upon which a Grand Jury may be expected to return an indictment (to be determined by consultation with the United States Attorney).

5. The desirability of trial and disposition of the entire offense in one court when the juvenile's associates in the alleged offense are adults who will be charged with a crime in the U. S. District Court for the District of Columbia.

6. The sophistication and maturity of the juvenile as determined by consideration of his home, environmental situation, emotional attitude and pattern of living.

7. The record and previous history of the juvenile, including previous contacts with the Youth Aid Division, other law enforcement agencies, juvenile courts and other jurisdictions, prior periods of probation to this Court, or prior commitments to juvenile institutions.

8. The prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the

juvenile (if he is found to have committed the alleged offense) by the use of procedures, services and facilities currently available to the Juvenile Court.

It will be the responsibility of any officer of the Court's staff assigned to make the investigation of any complaint in which waiver of jurisdiction is being considered to develop fully all available information which may bear upon the criteria and factors set forth above. Although not all such factors will be involved in an individual case, the Judge will consider the relevant factors in a specific case before reaching a conclusion to waive juvenile jurisdiction and transfer the case to the U. S. District Court for the District of Columbia for trial under the adult procedures of that Court.

SUPREME COURT OF THE UNITED STATES

No. 104.—October Term, 1965.

Morris A. Kent, Jr., Petitioner, *v.* United States.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[March 21, 1966.]

Mr. Justice Stewart, with whom Mr. Justice Black, Mr. Justice Harlan and Mr. Justice White join, dissenting.

This case involves the construction of a statute applicable only to the District of Columbia. Our general practice is to leave undisturbed decisions of the Court of Appeals for the District of Columbia Circuit concerning the import of legislation governing the affairs of the District. *General Motors Corp.* v. *District of Columbia*, 380 U. S. 553, 556. It appears, however, that two cases decided by the Court of Appeals subsequent to its decision in the present case may have considerably modified the court's construction of the statute. Therefore, I would vacate this judgment and remand the case to the Court of Appeals for reconsideration in the light of its subsequent decisions, *Watkins* v. *United States*, 343 F. 2d 278, and *Black* v. *United States*, — F. 2d —.